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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1035

NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOUFF TRANSFER, INC., TIDEWATER MOTOR TRUCK ASSOCIATION and DOLPHIN FORWARDING, INC.,

Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners New York Shipping Association, Inc. ("NYSA") and Council of North Atlantic Shipping Associations ("CONASA") pray that a writ of certiorari issue to review the judgment entered in this case on September 25, 1979 by the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the Court of Appeals is not yet reported officially.[1] A copy is reproduced as Appendix A in the separately bound appendix to this petition (App. A at 1a-74a).[2] The pertinent decisions and orders of the National Labor Relations Board ("NLRB" or "Board") are *International Longshoremen's Ass'n (Associated Transport, Inc.)* (App. B at 75a-98a) (hereinafter *"Associated Transport"*), which is reported officially at 231 N.L.R.B. 351 (1977) and unofficially at 96 L.R.R.M. 1636 (1977), and *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)* (App. C at 99a-116a) (hereinafter *"Dolphin"*), which appears officially at 236 N.L.R.B. No. 42 (1978) and unofficially at 98 L.R.R.M. 1276 (1978).

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 25, 1979. Petitions for rehearing *en banc* were denied on December 13, 1979 (App. H at 169a-178a). This petition is being filed within 90 days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

Statutes Involved

The relevant statutes, which are reproduced in the separately bound appendix (App. G at 166a-168a), are §§ 8(b)(4) and 8(e) of the Labor Management Relations Act, 1947, as amended ("LMRA"), 29 U.S.C. §§ 158(b)(4) and 158(e) (1976).

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[1] It has been unofficially reported at 102 L.R.R.M. 2361.

[2] References are to the pages of the separately bound appendix.

Question Presented

A grave conflict presently exists in the decisions of the NLRB and the courts with respect to the doctrine of work preservation. National labor policy as embodied in the doctrine of work preservation sanctions collectively bargained provisions preserving the traditional work of the protected unit employees from technological displacement. The fundamental threshold question in every work preservation case relates to the definition of the work in controversy—if it is equivalent to traditional unit work practices, it may lawfully be preserved or recaptured; if it is entirely new and unrelated work, it may not be acquired.

In many industries, technological innovation dislocates the work situs. It enables workers at other work sites to perform work identical or functionally equivalent to the traditional work practices of the protected unit.

The basic, but exceptionally important, question in this case is:

> Whether the Board may ignore the protected unit's traditional work practices, performed prior to the emergence of the technological innovation, by defining the work in controversy as that performed away from the protected unit's work situs because of the innovation, thus automatically precluding any opportunity for the unit employees to preserve their work?

Statement of the Case[3]

The Labor Controversy

This case arises from the turbulent history of a labor struggle that has raged in the shipping industry without

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[3] The underlying facts in this case are virtually identical to the facts in *International Longshoremen's Ass'n (Consolidated Ex-*

(footnote continued on following page)

interruption for the past 20 years. It is a classic chronicle of a labor union's efforts to exact from its members' employers contractual protection for the job security of its members, who were faced with a drastic loss of work opportunities because of technological job displacement (App. A at 12a-16a).

In the shipping industry the union, International Longshoremen's Association, AFL-CIO ("ILA"), has resisted the encroachments of advancing technology which has decimated the number of its members and diminished their work opportunities. The focus of contention has been the industry's increasingly prevalent use of large metal cargo containers to increase the efficiency of shipping operations by decreasing the need for the traditional piece-by-piece loading and unloading of ocean borne cargo by ILA represented longshoremen (App. A at 4a).

Historically, the work of longshoremen has not been limited to loading and unloading ships. As this Court determined in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977) and in *P. C. Pfeiffer Co.* v. *Ford*, 48 U.S.L.W. 4018 (Nov. 27, 1979) (No. 78-425), longshoremen physically handled the movement of all ocean borne cargo piece-by-piece from the hold of the steamship vessel to the tailgate of the pickup or delivery truck. This pattern of

(footnote continued from preceding page)

press, Inc.), 221 N.L.R.B. 956 (1975), *enf'd*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (U.S. No. 76-569) (hereinafter *"Conex I"*) and in *Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 452 F.Supp. 1024 (D.N.J. 1977), *aff'd in part and rev'd in part*, 602 F.2d 494 (3d Cir. 1979), *petitions for cert. filed*, 48 U.S.L.W. 3001 (U.S. June 22, 1979) (Nos. 78-1902 and 78-1905) (hereinafter *"Conex II"*). These facts have been articulated in the petitions for certiorari filed in both *Conex I* and *Conex II*. *See*, Pet. for Cert. in *Conex I* (No. 76-569) at 4-11; Pet. for Cert. in *Conex II* (No. 78-1905) at 3-12. However, for the convenience of the Court, these facts are recapitulated in this petition.

work encompassed not only the physical stowage and discharge of the cargo into and out of the vessel's hold, but also all of the interrelated functions of receiving the cargo, sorting the cargo, piling it onto pallets for stowage, removing the cargo from pallets and storing the loose cargo on the waterfront terminal for ultimate delivery to the consignees (App. A at 4a, 42a-45a; App. B at 85a-86a; App. C at 126a).

Containerization radically changed this traditional method of cargo handling so that now hundreds of crates, packages and cartons, weighing more than 30,000 pounds could be loaded or unloaded onto or off of an ocean vessel without a single package being handled by the longshoremen. The result was a devastating loss of ILA work opportunities and manhours of employment, and a dramatic increase in dockside work productivity (App. A at 4a-5a; App. B at 86a).

The Port of New York was the birthplace of this dynamic container revolution which first had its advent there in the late 1950's (App. A at 12a). Although a few metal containers were in use, starting in 1965 or 1966, it was not until the early 1970's that containerization, as it is known today, first appeared in other Atlantic Coast ports, including the Ports of Hampton Roads and Baltimore (App. A at 7a). Thereafter, there was a dramatic increase in container traffic and by 1973, containerized cargo reached appreciable proportions in all major North Atlantic ports.

From the advent of containerization in the late 1950's to the present, ILA and the employers of its member-longshoremen have disagreed about the use of containers (App. A at 5a-16a). The shipping employers, through their collective bargaining representatives, CONASA, NYSA, Hampton Roads Shipping Association ("HRSA") and

Steamship Trade Association of Baltimore ("STAB")[4] have consistently taken the position that their containers should be permitted to move on and off the docks without any ILA imposed restrictions. Conversely, ILA has strenuously resisted the use of containers. It has argued, just as this Court has already held in *Northeast Marine* and *Pfeiffer*, that the container itself is a part of the hold of a steamship vessel and should be loaded and unloaded by ILA longshoremen piece-by-piece and package-by-package, as had been done traditionally.

The first contractual attempt to resolve the issue of containerization was the 1959 collective bargaining agreement between ILA and NYSA in the Port of New York (App. A at 13a; App. C at 102a). Hundreds of grievances, dozens of work stoppages and wildcat strikes by ILA during the succeeding 10 year period evidenced the inadequacy of the 1959 contractual solution (App. A at 6a-7a; 14a-15a). During this time ILA consistently demanded the right to load and unload ("stuff" and "strip") the cargo in the containers.

After the introduction of the first fully containerized vessel into the major North Atlantic trade in 1967 and the published plans by many shipping employers to embark upon full container operations, ILA renewed its demand to stuff and strip all containers in the 1968 collective bargaining negotiations (App. A at 14a). This demand was rejected and a 57-day strike ensued on the North Atlantic

[4] NYSA, HRSA and STAB are membership associations which act, on behalf of their members, as multi-employer collective bargaining representatives in the negotiation and administration of labor contracts with ILA. CONASA has represented constituent shipping associations, including NYSA, HRSA and STAB, in ports from Massachusetts to Virginia. Since its formation in 1970, CONASA has bargained with the ILA over certain key issues, including containerization, on a master-contract basis. Prior to the formation of CONASA, North Atlantic ports generally adopted the master terms of the labor agreement negotiated in the Port of New York (App. A at 6a; App. D at 124a-125a).

Coast (App. A at 6a, 15a).[5] The Presidential Board of Inquiry, established pursuant to the national emergency provisions of the Taft-Hartley Act, 29 U.S.C. § 171, *et seq.* (1976), reported that one of the issues separating the parties was the consequences of containerization. Under unrelenting strike pressure, and with the assistance of federal mediators appointed by the President of the United States, the shipping employers reluctantly reached agreement with ILA (App. A at 6a-7a, 15a). The resulting collective bargaining agreement, which was adopted in all North Atlantic ports, including New York, Baltimore and Hampton Roads, contained the Rules on Containers ("Rules")—essentially the same contractual provisions as those being challenged in the present case.

The Rules represented a compromise between labor and management on the containerization issue. This compromise permitted the overwhelming bulk, or more than 80% of the container traffic, consisting of containers loaded with the cargo of a single shipper or consignee who is the beneficial owner of the cargo ("full shippers' load" or "FSL"), to pass over the piers intact without any stripping or stuffing by ILA dockworkers.[6] However, the Rules provided that, if there is to be any loading or unloading of ocean borne cargo into or out of the shipping employers' containers within the local port area (other than by employees of the beneficial owner of the cargo), that work should continue to be performed by longshoremen at the piers, as it has traditionally. Thus, any export container which was loaded with the individual cargo lots of several shippers ("consolidated"), at a local off-pier facility lo-

[5] The strike continued for more than 100 days in other Atlantic and Gulf Coast ports (App. A at 6a).

[6] The Rules also exempted from pierside cargo handling any container originating at or destined to points 50 or more miles from the port (App. A at 15a).

cated within 50 miles of a port, was to be stripped and stuffed into a container at pierside by ILA longshoremen. The converse applied to an import consolidated container; its contents would be stripped at the pier, if it contained the shipments of several consignees and was destined for unloading at an off-pier facility within the local 50 mile port area (App. A at 15a).

Shortly after the Rules were formalized in the 1968 labor contract, their validity was upheld—first, under the LMRA by a Regional Director and General Counsel of the NLRB, and then under the antitrust laws by the United States Court of Appeals for the Second Circuit in *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n,* 426 F.2d 884 (2d Cir. 1970) (hereinafter "*ICTC*") (App. A at 34a-35a).

In 1971, after another long strike of 56 days' duration, the resulting labor contract with the ILA, now negotiated by CONASA, left the 1968 Rules intact (App. A at 9a-10a). Despite the contractual formality of the Rules, ILA continued to assert that the shipping employers were permitting, if not encouraging, violations of the labor contract, thus depriving ILA members of their traditional work. Faced with the ILA strike threat to halt the movement of all containers if the Rules were not effectively enforced, the shipping employers capitulated in 1973 to an amendment to the collective labor contract, known as the Dublin Supplement, that was designed to eliminate the violations cited by ILA (App. A at 15a-16a).

In the Port of New York, the ILA's principal complaint was directed against the shipment of consolidated containers even though their contents had not been handled by ILA longshoremen at the docks as required by the Rules. To preclude this type of violation of the Rules, the Dublin Supplement expressly prohibited the shipping employers from releasing their containers to off-pier con-

solidation facilities. The shipping employers were to advise the consolidation companies to deliver their cargo lots to the pier where they would be physically loaded in the first instance into the shipping employers' containers by their own ILA longshore employees. Any import consolidated container was to be stripped at pierside and its contents picked up by the consolidator in uncontainerized form.

In Hampton Roads and Baltimore, the controversy between the ILA and the shipping employers centered upon imported FSL containers which, although destined for delivery intact to their consignees, were stopped short of their ultimate destination and stripped at warehouses or trucking stations within 50 miles of the port ("shortstopped containers") (App. A at 39a). The Dublin Supplement expressly reflected the longstanding and unequivocal understanding of both the ILA and the shipping employers that shortstopped containers lost their FSL identity, and were the equivalent of consolidated containers to be stripped at the piers (App. A at 11a). However, the ILA agreed in the Dublin Supplement to an exception from the pierside stripping requirements of the Rules for FSL containers destined for unloading at warehouses within the 50 mile port area, provided their contents were genuinely warehoused for the customary 30 day period (App. A at 11a; 39a; App. B at 88a).

The basic principles embodied in the 1968 and 1971 Rules and Dublin Supplement were codified in the Rules on Containers contained in the 1974 CONASA-ILA collective bargaining agreement (App. A at 11a-12a; 16a; App. B at 87a; App. D at 134a).

Containerization continues to this day to be a hotly contested and complex issue in longshore labor relations. The NLRB's initial invalidation in 1975 of the Rules in the Port of New York in *Conex I* disrupted the compromise resolution that had prevailed for almost a decade and in-

jected untoward uncertainty and confusion into the 1977 negotiations. Once again job security for longshoremen displaced by containerization was the principal bargaining issue. Once again the negotiations were marked by a major two month strike by longshoremen against container operators from Maine to Texas. The 20 year struggle over containerization continues unabated. It is likely to flare up again during the national longshore negotiations that will commence in the spring of 1980, especially in view of the conflicting decisions of the District of Columbia Circuit in this case and of the Second Circuit in the factually indistinguishable *Conex I*.

The Proceedings Below

A. Associated Transport

In 1974, two shipping employers, United States Lines and Lavino Shipping Company, were fined for violating the Rules on Containers in the Ports of Hampton Roads and Baltimore. Their containers had been shortstopped and stripped within the 50 mile port area at off-pier terminals operated by Associated Transport, Inc. and Houff Transfer, Inc., motor carriers engaged in interstate trucking operations, a minor portion of which has, since 1970, included the drayage of FSL containers. When Associated and Houff refused to reimburse the fines, the shipping employers rescinded the authority of these motor carriers to haul containers (App. A at 20a-21a; App. B at 93a-94a; App. D at 139a-142a).

Associated and Houff then filed unfair labor practice charges with the NLRB.[7] This initially set in motion two

[7] Charges were also filed by Tidewater Motor Truck Association, a membership association of motor carriers including Associated. Only Houff and Tidewater actively participated as intervenors in the Court of Appeals.

proceedings that ultimately resulted in the issuance of preliminary injunctions under LMRA § 10(l), 29 U.S.C. § 160(l) (1976), but only after diametrically divergent district court determinations on the same basic facts. *Compare Humphrey* v. *International Longshoremen's Ass'n,* 401 F. Supp. 1401 (E.D. Va. 1975), *rev'd,* 548 F. 2d 494 (4th Cir. 1977) (injunction denied in Port of Hampton Roads, but reversed on appeal) *with Humphrey* v. *International Longshoremen's Ass'n,* No. Y-75-1395 (D.Md. Mar. 25, 1976) (injunction granted in Port of Baltimore).

The charges were then litigated before an Administrative Law Judge who concluded, in strict reliance upon the earlier *Conex I* decision, that the Rules violated LMRA § 8(e), and that ILA's coercion of the shipping employers to enforce these contractual provisions violated the secondary boycott proscriptions of LMRA § 8(b)(4) (App. D at 117a-157a). A three member panel of the Board affirmed in a split opinion (App. B at 75a-98a).

B. Dolphin

In the Port of New York, the Rules were enforced in late 1974 and early 1975 against two shipping employers, Transamerican Trailer Transport, Inc. and Maritime Transportation Management, Inc. They were fined for permitting the shipment without pierside stripping and stuffing of containers consolidated off-pier by San Juan Freight Forwarders, Inc. and Dolphin Forwarding, Inc. These companies are engaged in the business of consolidating the individual cargo lots of various shippers by placing them into containers in preparation for ocean transport. When the shipping employers, in accordance with the Rules, refused to furnish off-pier access to their containers to Dolphin and San Juan, these consolidation companies filed unfair labor practice charges with the NLRB (App. A at 21a-22a).

An application by the NLRB for a preliminary injunction under LMRA § 10(l) was denied. *Danielson* v. *International Longshoremen's Ass'n,* No. 75 Civ. 4027 (S.D.N.Y. Sept. 18, 1975). The charges were then litigated before an Administrative Law Judge who struck all defenses (App. E at 158a-163a) and rejected virtually all defense evidence because he considered the case before him to be dispositively controlled by the earier *Conex I* decision (App. F at 164a-165a). An initial decision by the Administrative Law Judge was waived. Thereafter, the charges were transferred for decision to a panel of the Board which also expressly considered *Conex I* to be controlling (App. C at 99a-116a). It thus concluded that the Rules constituted a hot cargo agreement in violation of LMRA § 8(e), and that their enforcement by ILA against the shipping employers was proscribed secondary activity in violation of LMRA § 8(b)(4).

C. The Decisions of the Board

The Board's decisions in *Associated Transport* and *Dolphin* are virtually identical. In each case, the Board adjudicated the same fundamental question: whether the Rules are lawful work preservation provisions designed to preserve for longshoremen their traditional work functions which were threatened by technological displacement.

In each case, the Board's invalidation of the Rules, as an unlawful work acquisition agreement, did not result from the exercise of its fact finding powers. The facts in each case were undisputed. Instead, the Board's conclusion rested upon a fundamental error of law stemming from its adjudication of the elementary threshold issue present in every work preservation case, namely the definition of the work in controversy.

The Board, as it had in *Conex I,* defined the work in controversy by focusing exclusively on the off-pier stuffing and stripping of containers by consolidators' and motor

carriers' employees who had acquired this work as a result of the innovation wrought by containerization. In the Board's view, since the longshoremen's work jurisdiction has always been confined to waterfront facilities, they necessarily could not have traditionally performed the work in controversy, and, hence, by definition, the Rules must amount to an unlawful work acquisition device (App. B at 81a; App. C at 103a).

D. The Decision of the Court of Appeals

The Court of Appeals panel by a divided vote reversed and vacated the Board decisions. The majority concluded, as a matter of law, that the Board erroneously misinterpreted and misapplied the doctrine of work preservation formulated by this Court in *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612 (1967) and *NLRB* v. *Enterprise Ass'n of Steam, etc. Pipefitters,* 429 U.S. 507 (1977).

The majority principally disagreed with the Board's definition of the work in controversy. It found this definition to be legally defective since it had been constructed by completely ignoring the traditional work practices performed by longshoremen prior to the introduction of the technological innovation of containerization.[8] In the

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[8] The Board's error of law is especially pronounced in light of the fact that the Board completely overlooked the striking similarities between the traditional work practices of longshoremen and the work of stuffing and stripping containers. It refused to adopt the inescapable conclusion previously reached by this Court that stuffing and stripping containers is the functional equivalent of traditional longshore work practices. *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249, 270 (1977), *aff'g, Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35 (2d Cir. 1976). *Accord, P.C. Pfeiffer Co.* v. *Ford,* 48 U.S.L.W. 4018 (Nov. 27, 1979) (No. 78-425); *Stockman* v. *John T. Clark & Son of Boston, Inc.,* 539 F.2d 264, 272, 275-77 (1st Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); *see also, Leather's Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800, 815 (2d Cir. 1971).

majority's view, the Board's analysis thus failed to examine "all of the surrounding circumstances" prescribed in *National Woodwork* and *Enterprise* and, if allowed to prevail, would virtually obliterate the doctrine of work preservation:

> This formulation of the work in controversy, however, could not reasonably have been based on 'all the surrounding circumstances' as required by *National Woodwork* and *Pipefitters*. When a technological innovation is introduced in the workplace, new work may be created and may initially be performed, as in these cases, by employees other than those who worked with the old technology. The crucial question is how best to rationalize the work that results from the innovation into traditional work patterns. As a rule, this cannot be done by ignoring those traditional work patterns when defining the work in controversy. But that is precisely what the NLRB has done here. Rather than define a category of work based on work patterns both prior and subsequent to the innovation, the Board has defined the work in controversy specifically in terms of the innovation, thus *by definition* removing any opportunity for pre-innovation workers to preserve their work. Under such a formulation the Supreme Court's work preservation doctrine is sapped of all life.

(App. A at 41a-42a; emphasis in original and footnotes omitted).

The Court of Appeals also exposed two other fatal legal flaws in the Board's decisions. Each involved a basic misapplication by the Board of a key work preservation principle established by this Court in *National Woodwork* and *Enterprise*. The first related to the "touchstone" of analysis sculptured by the *National Woodwork* Court for every work preservation case, namely, whether

the challenged agreement or its implementation is addressed to the labor relations of the contracting employers *vis-a-vis* their own employees. 386 U.S. at 645. Conspicuously absent in this case was any organizational or other secondary purpose on the ILA's part with respect to the labor relations of the motor carriers or consolidators. Nevertheless, as the Court of Appeals panel concluded, the Board erroneously discounted this critical element of valid primary work preservation activity (App. A at 46a-48a).

The second defect uncovered by the majority of the Court of Appeals panel was the Board's disregard of another key work perservation principle, namely, the Board's own right of control test sanctioned by this Court in *Enterprise*. The Board simply failed to take into account the contracting shipping employers' power of control to assign the disputed container stuffing and stripping work to their own ILA represented longshore employees—another crucial element of a lawful, primary work preservation clause (App. A at 49a-50a).

In essence then, the Board is following a decision-making course, first embarked upon in *Conex I*, in which it has improperly departed from the elementary principles of this Court's work preservation doctrine. If left unchecked, the effect of the Board's errant departure could be the demise of the work preservation doctrine. The Court of Appeals for the District of Columbia Circuit has exposed the fundamental legal errors being committed by the Board. In so doing, it has irreconcilably disagreed with the Second Circuit's decision in *Conex I* and with the decisions of other circuits.

Petitioners respectfully submit that the District of Columbia Circuit's determination in this case is the only legally correct decision and that the previous adjudications by the Board and other circuits are in error. The pro-

found judicial disagreement that now exists has created confusion and uncertainty in longshore labor relations. It is likely to have a marked disruptive influence on the forthcoming national collective bargaining negotiations that will soon commence in 1980 in the longshore industry on the North Atlantic, South Atlantic and Gulf Coasts of the United States. It is for this reason that petitioners ask this Court to invoke its reviewing authority in this case to remove the sharp legal conflict by issuing a definitive determination regarding the lawfulness of the Rules on Containers under federal labor law.

Reasons for Granting the Writ

1. Substantial and Novel Questions of Federal Labor Law

This case presents substantial questions of federal law involving the basic elements of the doctrine of work preservation. The principal legal error committed by the Board in its definition of the "work in controversy" relates to the recurring, threshold issue present in every work preservation case. The Court of Appeals panel that decided the merits underscored the significance and substantiality of this basic federal labor question.[9] In its view, if the Board's definition were to prevail, "the Supreme Court's work preservation doctrine is sapped of all life" (App. A at 42a; footnote omitted).

The Board's erroneous reformulation of the work preservation doctrine also seriously frustrates the fundamental aspect of national labor policy upon which this doctrine is founded. Congress has expressly chosen a national regime in which "[a]s with most other aspects of American industrial relations, the problem of technological

[9] It is also significant that the four (4) Circuit Judges, who dissented from the denial of rehearing *en banc*, considered the case worthy of review by the full circuit court (App. H at 169a-174a).

innovation has been left to the system of private ordering we know as collective bargaining" (App. A at 5a; footnote omitted). The Board's approach, if left undisturbed, stands as a stark warning to any union faced with the demand to permit innovation, that it does so at its peril. No employer or union sitting down to bargain collectively on the subject of work preservation and job security could possibly know in advance whether the resulting labor agreement would prevail if the Board may have unbridled discretion to undo the bargain by the imperfect and purely subjective device of defining the work in controversy "in terms of the innovation" (App. A at 41a). Different and arbitrary results would prevail from industry to industry, from employer to employer, from work function to work function, from case to case. Forward looking collective compromises would be thwarted. Instead, there would be a reversion to economic warfare as labor unions would become "obdurate when asked to compromise some degree of job security for the sake of efficiency if that compromise might later be cast aside" (App. A at 30a).

The Court of Appeals panel appreciated the substantial importance of the labor law questions in this case and the far reaching nationwide ramifications of the Board's errors. The majority opinion was over 65 pages in length and it is perfectly apparent from the opinion that the majority considered it essential to undertake an extensive therapeutic treatment of the Board's erroneous misapplication of the work preservation doctrine. Chief Judge J. Skelly Wright of the District of Columbia Circuit meticulously reviewed and analyzed (1) the factual background surrounding the formulation and development of the Rules on Containers; (2) the fundamental legal principles embodied in the doctrine of work preservation; (3) the extended history of litigation involving the legality of the Rules on Containers under both federal labor law and federal antitrust law; and (4) the crucial legal errors contained in the Board's adjudications in this case.

2. The Work Preservation Doctrine—Irreconcilable Conflict In The Circuits

The decision of the Court of Appeals is important not only because of the significant federal labor law questions addressed, but also because the majority opinion on these questions is in direct conflict with determinations reached by other circuit courts. The majority's determination that the collectively bargained Rules are lawful work preservation provisions under federal labor law irreconcilably conflicts with the earlier split decisions of the Second Circuit in *Conex I* (Feinberg, J., dissenting) and of the Fourth Circuit in *Humphrey* v. *International Longshoremen's Ass'n*, 548 F.2d 494 (4th Cir. 1977) (Craven, J., dissenting).[10]

Conex I involved virtually the same operative enforcement of the same Rules in the Port of New York against two other off-pier consolidation companies, who, like the charging parties in the *Dolphin* phase of this case, were engaged in the off-pier consolidation of ocean borne cargo in the New York to Puerto Rico trade. To reiterate, the Second Circuit in *Conex I* held that essentially the same prohibitions, found lawful by the Court of Appeals in this case, violated the hot cargo and secondary boycott proscriptions of the federal labor statutes. The Fourth Circuit in *Humphrey* scrupulously adhered to the *Conex I* determination in issuing preliminary injunctive relief in the LMRA § 10(l) proceeding underlying the *Associated Transport* phase of this case.

Both the Second and Fourth Circuits perfunctorily deferred to the fact finding expertise of the Board. However,

[10] A conflict may also exist with the First Circuit's decision in *International Longshoremen's Ass'n, Local 1575* v. *NLRB*, 560 F.2d 439 (1st Cir. 1977), although, as the majority of the District of Columbia Circuit panel recognized in this case, there are significant factual distinctions between these two cases. *See*, App. A at 37a-38a.

the majority in the case at bar expressly rejected the other circuits' *ratio decidendi* since the facts in all of these cases involving the Rules are admittedly undisputed. The majority pointed out that its disagreement with the Board and other circuits exclusively rests upon what it considered to be the "erroneous legal foundations"[11] of the Board's adjudications (App. A at 52a).

The Board's novel and unprecedented definition of the work in controversy injects an impractical, unduly subjective and potentially arbitrary standard into the work preservation doctrine. It directly conflicts with *National Woodwork*. If the *National Woodwork* Court had adopted the Board's definition of the work in controversy "in terms of the innovation", *i.e.*, the work on prefit doors at the door manufacturers' plants, it would have been impelled to reach a completely different result by invalidating the clause, which prohibited the use of such prefit doors at construction sites, since by definition the boycotting carpenters did not perform any work on the prefit doors away from the construction site.

The Board's definition is also contrary to the rulings in every case that has considered the issue of work preservation since *National Woodwork* with the exception of the split decisions in *Conex I* and *Humphrey* and possibly the First Circuit's determination in *Local 1575*. It represents a significant departure from the prevailing definition of the work in controversy embraced by these other courts. *See, Enterprise; Houston Insulator Contractors Ass'n* v. *NLRB*, 386 U.S. 664 (1967); *Sheet Metal Workers Local 223* v. *NLRB*, 498 F.2d 687 (D.C. Cir. 1974); *Local 742, United Bro. of Carpenters & Joiners* v. *NLRB*, 444 F.2d 895 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971); *ICTC; Canada Dry Corp.* v. *NLRB*, 421 F.2d 907 (6th Cir. 1970);

[11] *NLRB* v. *Brown*, 380 U.S. 278, 290-92 (1965); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

American Boiler Manufacturers Ass'n v. *NLRB*, 404 F.2d 547 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970); *NLRB* v. *Local 164, IBEW*, 388 F.2d 105 (3d Cir. 1968); *NLRB* v. *Local 28, Sheet Metal Wkrs. Int'l Ass'n*, 380 F.2d 827 (2d Cir. 1967); *cf., Electro-Coal Transfer Corp.* v. *General Longshore Wkrs. Local 1418*, 591 F.2d 284 (5th Cir. 1979); *Frito-Lay, Inc.* v. *Retail Clerks Local 7*, 452 F. Supp. 1381 (D. Colo. 1978).[12]

Review of the fundamental labor law issues in this case will enable this Court to resolve the sharp conflict in the circuits concerning the correct definition of the work in controversy and the other appropriate principles to be applied to challenged work preservation clauses, and the consequences of the chosen standards upon the proper accommodation between the doctrine of work preservation and the national labor policy favoring the peaceful resolution, through collective bargaining, of labor disputes, including job security problems occasioned by technological displacement. 29 U.S.C. § 151 (1976).[13]

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[12] *See also, Meat and Highway Drivers, Local 710* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964); *Local 98, Sheet Metal Wkrs. Int'l Ass'n* v. *NLRB*, 433 F.2d 1189 (D.C. Cir. 1970) (Wright, J., dissenting).

[13] This Court's resolution of the labor law aspects of this case will have an immediate impact upon several adjudicatory proceedings now pending in other circuits and before the NLRB involving the legality of the Rules on Containers. In these cases, the Board is scrupulously following the erroneous definition of the work in controversy first fashioned in *Conex I* and rejected by the Court of Appeals in this case. *See, International Longshoremen's Ass'n (Beck Arabia, Ltd.)*, 245 N.L.R.B. No. 172 (Sept. 28, 1979), *appeal docketed*, No. 79-1672 (4th Cir. Oct. 16, 1979) (Board decision invalidating enforcement of the Rules in the Port of Baltimore); *International Longshoremen's Ass'n Local 1408 (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. No. 171 (Sept. 28, 1979), *appeal docketed*, No. 79-3444 (5th Cir. Oct. 16, 1979) (Board decision invalidating enforcement of the Rules in the Port of Jackson-

(footnote continued on following page)

3. Important Interrelated Antitrust Aspects—The Doctrine of Labor Exemption And The Rule Of Reason

This accommodation will also have a significant and material bearing upon the overlapping policy of federal antitrust law. Indeed, this case is intimately related to a companion antitrust/labor case now pending before this Court. *Conex II*.[14]

The earlier adjudications by the Board and Second Circuit in *Conex I* constituted the predicate for the Third Circuit's judgment in *Conex II*. Through the invocation of the doctrine of collateral estoppel, the Third Circuit automatically imposed LMRA § 303, 29 U.S.C. § 187 (1976), liability against ILA for its enforcement of the Rules on Containers. Within the same context, it also formulated a novel, unprecedented and unduly onerous test that must be satisfied by both the ILA and the shipping employers before they will be entitled to the protective aegis of the non-statutory labor exemption from antitrust liability.

(footnote continued from preceding page)

ville); *International Longshoremen's Ass'n (Terminal Corp)*, Nos. 5-CC-925 and 5-CC-929 (Dec. 11, 1979) (Administrative Law Judge's initial decision invalidating the Rules in the Port of Baltimore in which it was held that, despite the decision of the Court of Appeals in this case, the Administrative Law Judge was compelled to adhere to contrary Board authority); *International Longshoremen's Ass'n, Local 1410 (Custom Brokers, Inc.)*, No. 12-CE-30 (pending proceeding before Administrative Law Judge involving challenge to the Rules in the Port of Miami), *Local 1242, International Longshoremen's Ass'n (Hill Creek Farms, Inc)*, Nos. 4-CC-1133 and 4-CE-55 (pending proceeding before Administrative Law Judge involving challenge to the Rules in the Port of Philadelphia).

[14] The Solicitor General has filed an *amicus curiae* brief in *Conex II* in response to this Court's October 9, 1979 invitation in which the United States suggests that this Court's review of the case *sub judice* could directly and fundamentally affect *Conex II*.

Absent this exemption, the enforcement of the Rules would, in the opinion of the majority of the Third Circuit panel, constitute a *per se* violation of §§ 1 and 3 of the Sherman Act, 1890, as amended, 15 U.S.C. §§ 1 and 3 (1976), for which treble damages and injunctive relief would be available under §§ 4 and 16 of the Clayton Act, 1914, as amended, 15 U.S.C. §§ 15 and 26 (1976), since the Third Circuit majority rejected the necessity for any rule of reason antitrust analysis.[15]

Contrary to the decision in *Conex I*, the Court of Appeals in this case has now determined that the same Rules on Containers are not only lawful under federal labor law but also

> represent a reasoned response to the difficult problem of technological innovation and are an exemplar of the self-government contemplated by Congress when it left the bulk of industrial problems to be resolved in the private sector . . . Courts and the NLRB must take great care not to disturb the parties' reasoned attempts at self-governance unless those attempts contravene the law. For the reasons stated in this opinion, we believe that the NLRB has failed to demonstrate that the Rules on Containers and action seeking to enforce the Rules are in contravention of the law.

App. A at 53a-54a; footnotes omitted.

Certainly the views expressed by the majority of the District of Columbia Circuit in this case are in irreconcilable conflict with the Third Circuit's judgment in *Conex*

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[15] In the same fashion as *Conex II*, the Board litigations in this case have spawned actions under the antitrust laws and under LMRA § 303. *See, Houff Transfer, Inc.* v. *International Longshoremen's Ass'n*, No. T-74-1336 (D.Md. filed Dec. 5, 1974) and *Dolphin Forwarding, Inc.* v. *New York Shipping Ass'n*, No. 79-276 (D.N.J. filed Jan. 13, 1979).

II that enforcement of the same Rules may well expose ILA and the shipping employers to treble damages under the antitrust laws. This decision highlights the national importance of the intertwined labor/antitrust issues presented by the Rules on Containers and their enforcement.[16] It is the latest illustration of the sharp judicial discord which has arisen in the circuits. It underscores the need for this Court's review of these exceptionally important issues.

4. Furtherance of the Public Interest—National Scope and Importance of This Case

The resolution of the present conflicting state of the law will directly and materially prevent volatile labor-management confrontations in a vital national industry. It is thus within the public interest for this Court to accept this case for review.

The settlement embodied in the Rules resulted from more than two decades of hard bargaining and contending economic pressures, which produced lengthy longshore strikes in 1959, 1962, 1964, 1968, 1971, 1975 and 1977. This settlement had received the *imprimatur* of both the executive and judicial branches (App. A at 6a-7a). *See, ICTC.* However, in 1975, many years after the initial adoption of

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[16] Federal shipping policy is also a relevant ingredient to be added to the blend of federal antitrust and labor policies. Certain shipping employer tariffs, which incorporated verbatim the Rules on Containers, have been declared unlawful by the Federal Maritime Commission under §§ 14 Fourth, 16 First and 18(a) of the Shipping Act, 1916, as amended, 46 U.S.C. §§ 812, 815 and 817 (1976), and § 4 of the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. § 845a (1976). *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers and Puerto Rico Maritime Shipping Authority—Proposed ILA Rules on Containers,* FMC Docket Nos. 73-17 and 74-40 (June 14, 1978), *appeal docketed sub nom. Council of North Atlantic Shipping Associations and New York Shipping Ass'n* v. *FMC,* No. 78-1776 (D.C. Cir. Aug. 9, 1978).

the Rules, they were declared invalid in *Conex I* and the parties were once again forced to grapple with the thorny problems of technological displacement.

The succeeding 1977 negotiations were unduly complicated by the parties' struggle for a viable alternative to fill the critical gap created by the invalidation of the Rules. An inevitable impasse was reached. The ensuing lengthy strike on the East and Gulf Coasts had a harmful and irreparable impact upon the national economy. To this day, it has still not recovered from the disastrous deficit in the foreign balance of payments caused by the strike.

The potential for labor strife in the forthcoming 1980 longshore negotitations has been immeasurably enhanced by the incompatible decisions in *Conex I* and in this case. Undoubtedly, the uncertainty and confusion wrought by these discordant circuit court decisions will engender untoward difficulties in reaching a collectively bargained accord.

The ramifications nationwide of the irreconcilable conflict in the circuits relating to the elementary principles of the work preservation doctrine upon future collective bargaining negotiations, including those that will soon commence in the Spring of 1980 in the longshore industry on the Atlantic and Gulf Coasts, strongly support the need for this Court's review. This case presents an opportunity for this Court (1) to review exceptional federal questions of national importance, which it has not yet addressed, (2) to reconcile the conflicting interpretations by the lower courts of this Court's doctrine of work preservation and its prior decisions in *National Woodwork* and *Enterprise,* and (3) to establish an appropriate and pragmatic accommodation, within the context of the complex and highly sensitive interplay of federal labor, antitrust and shipping policies, between the doctrine of work preservation and the national labor policy favoring collective bargaining as the medium for the peaceful resolution of industrial disputes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 31, 1979

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-1035

NEW YORK SHIPPING ASSOCIATION, INC., *et al.*, *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*, *Respondents.*

No. 79-1036

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*, *Respondents.*

No. 79- 79-1082

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*, *Respondents.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR NEW YORK SHIPPING ASSOCIATION, INC. AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

(Petitioners in No. 79-1035 and Respondents in No. 79-)

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BRIEF FOR NEW YORK SHIPPING ASSOCIATION, INC. AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

This brief is filed by New York Shipping Association, Inc. ("NYSA") and Council of North Atlantic Shipping

Associations ("CONASA"), pursuant to Rule 24 of the Rules of this Court, to advise the Court that they support the petitions filed by the International Longshoremen's Association, AFL-CIO ("ILA") in No. 79-1036 and by the Solicitor General on behalf of the National Labor Relations Board in No. 79- .

Although NYSA and CONASA do not endorse the factual statements and legal arguments contained in the Solicitor General's petition, they do agree, for the reasons advocated in their petition in No. 79-1035, that review of the decision of the District of Columbia Circuit in this case is warranted. Review will enable this Court (1) to adjudicate the exceptional questions of national importance involving the doctrine of work preservation; and, (2) to reconcile the disruptive intercircuit conflict that now prevails on the question of the legality of the collectively bargained Rules on Containers under federal labor law.

Contrary to the contention of the Solicitor General, however, NYSA and CONASA respectfully submit that the decision of the District of Columbia Circuit in this case is eminently sound, and should be upheld.

NYSA and CONASA concur in the Solicitor General's appraisal that, unless the uncertainty and confusion created by the discord in the circuits is speedily resolved, there is grave danger that the forthcoming 1980 negotiations for a new labor contract in the longshore industry on the Atlantic and Gulf Coasts "will, as they have in the past, result in industrial strife over the containerization question." It is thus within the national interest that the Court entertain review of this case.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Dated: New York, New York
January 7, 1980

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No. 79-1082

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and
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Respondents,
v.
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No. 79-1099

DOLPHIN FORWARDING, INC.,
Petitioner,
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,
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(Petitioner in No. 79-1082),
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NEW YORK SHIPPING ASSOCIATION, INC., *et al.*,
(Petitioners in Nos. 79-1035 and 79-1036).
No. 79-

ON PETITIONS AND CROSS-PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR NEW YORK SHIPPING ASSOCIATION, INC. AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

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ON PETITIONS AND CROSS-PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR NEW YORK SHIPPING ASSOCIATION, INC. AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

This brief is filed by New York Shipping Association, Inc. ("NYSA") and Council of North Atlantic Shipping Associations ("CONASA"), pursuant to Rule 24 of the Rules of this Court, to supplement their earlier brief filed in Nos. 79-1035, 79-1036 and 79-1082. NYSA and CONASA hereby advise the Court that, in addition to supporting the petitions filed by the International Longshoremen's Association, AFL-CIO in No. 79-1036 and by the Solicitor General on behalf of the National Labor Relations Board in No. 79-1082, they also do not oppose the other petitions for certiorari submitted in Nos. 79-1099, *et al.*

Although NYSA and CONASA do not endorse the factual statements and legal arguments contained in these other petitions, they do agree, for the reasons advocated in their petition in No. 79-1035, that review of the decision of the District of Columbia Circuit in this case is warranted.

However, contrary to the contentions contained in these other petitions, NYSA and CONASA respectfully submit that the decision of the District of Columbia Circuit in this case is eminently sound, and should be upheld.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted to review the judgment entered in this case on September 25, 1979 by the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Dated: New York, New York
January 16, 1980

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Respondent,

and

HOUFF TRANSFER, INC., TIDEWATER MOTOR TRUCK ASSOCIATION and DOLPHIN FORWARDING, INC.

Intervenor-Respondents.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOUFF TRANSFER, INC., TIDEWATER MOTOR TRUCK ASSOCIATION and DOLPHIN FORWARDING, INC.,

Intervenor-Respondents.

JOINT APPENDIX TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appendix A—Opinion of Court of Appeals.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 77-1758

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
HOUFF TRANSFER, INC., INTERVENOR

No. 78-1510

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO AND NEW YORK SHIPPING ASSOCIATION, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petitions to Review and Cross-Applications
to Enforce Orders of the
National Labor Relations Board

Argued January 18, 1979

Decided September 25, 1979

Thomas W. Gleason for petitioner International Longshoremen's Association.

Constantine P. Lambos, with whom *Donato Caruso* was on the brief, for petitioner New York Shipping Association, Inc.

Howard E. Perlstein, Attorney, National Labor Relations Board, and *Kathy L. Kreiger,* Attorney, National Labor Relations Board, of the bar of the Supreme Court of the State of New York, *pro hac vice,* by special leave of court, with whom *John S. Irving,* General Counsel, *Carl L. Taylor,* Associate General Counsel, *Robert E. Allen,* Acting Associate General Counsel, and *Elliott Moore,* Deputy Associate General Counsel, National Labor Relations Board, were on the brief, for respondent.

William J. Auten, with whom *J. W. Alexander, Jr.* was on the brief, for intervenor Houff Transfer, Inc.

Before WRIGHT, *Chief Judge,* and ROBINSON and ROBB, *Circuit Judges.*

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissening opinion filed by *Circuit Judge* ROBB.

WRIGHT, *Chief Judge:* The National Labor Relations Board (NLRB) decided in these cases—one arising in the Port of New York,[1] the other in the Ports of Balti-

[1] No. 78-1510, reviewing *International Longshoremen's Ass'n,* 98 L.R.R.M. 1276 (1978).

more and Hampton Roads[2]—that petitioners Council of North Atlantic Shipping Associations (CONASA), New York Shipping Association (NYSA), and International Longshoremen's Association (ILA) violated the congressional proscription of secondary boycotts.[3] Petitioners challenge the Board's rulings as inconsistent with the Supreme Court's work preservation doctrine, and the Board cross-applies for enforcement of its orders.[4]

The work preservation doctrine provides generally that efforts to preserve work for employees displaced by technological innovation are not unlawful secondary activities and that union-management contracts with the same purpose are not proscribed "hot cargo" agreements. Activities and agreements, however, that seek not to preserve the traditional work of displaced workers but to acquire work of other employees are unlawful under the congressional proscription. The question before us is whether certain rules agreed to by shipping companies and the ILA are an effort by the ILA to acquire work or merely an attempt to preserve its members' traditional responsibilities in the era of containerized shipping.

The NLRB held that petitioners were engaged in work acquisition rather than work preservation. Because we

[2] Nos. 77-1735 and 77-1758, reviewing *International Longshoremen's' Ass'n,* 231 N.L.R.B. 351 (1977).

[3] The two cases, though strikingly similar and capable of being treated in a single opinion, have presented the court with independent sets of documents: briefs, joint appendices, etc. Because reference to these documents may cause some confusion, this opinion where necessary will identify the document within the appropriate case by provision of a parenthetical abbrevation of the relevant port or ports. For example, the Joint Appendix (JA) for Nos. 77-1735 and 77-1758, arising in Baltimore and Hampton Roads, will be cited as JA(B-HR); that for No. 78-1510, arising in New York, will be cited as JA(NY).

[4] 29 U.S.C. §§ 160(e), (f) (1976).

believe this judgment rests on erroneous interpretations of the Supreme Court's decisions in *National Woodwork Manufacturers Ass'n v. NLRB*[5] and *NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters,*[6] we grant the petitions for review and set aside the Board's orders. We also deny the Board's cross-applications for enforcement.

I. Background

The factual antecedents of the instant disputes revolve around a specific technological innovation—containerization—that has had a momentous impact on the loading and unloading of ocean-borne cargo.[7] Containers are large metal receptacles that can accommodate upwards of 30,000 pounds of cargo and that can be moved to and from a ship as a single unit.[8] Historically, longshoremen transported such cargo piece by piece from the hold of a ship to the pier for inbound cargo and vice versa for outbound cargo.[9] Subsequent to the advent of containerization, however, the role of longshoremen in handling cargo has been greatly reduced. It is now the case that containers can be transported to and from ships without longshoremen handling any of the boxes, crates, and packages enclosed in each container.

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[5] 386 U.S. 612 (1967).

[6] 429 U.S. 507(1977).

[7] *See* Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions,* 21 Lab. L. J. 397, 398-400 (1970). The impact of containerization has been felt in ports around the world. *See, e.g.,* Davies, *In Search of Jobs and Defendants,* 36 Mod. L. Rev. 78 (1973) (detailing controversies caused by containerization in British ports of Liverpool, Hull, and London).

[8] *See, e.g.,* JA(B-HR) 1056a (specifying allowable weight of one container as 33,000 pounds).

[9] *See* JA (B-HR) 337a-339a, 1087a-1089a (describing traditional work patterns of ILA labor on the docks); Ross, *supra* note 7, at 398-399 (same).

Containerization obviously engendered huge increases in dockside productivity. According to one estimate, the traditional method of handling cargo translated into a productivity factor of 1.4 tons per man-hour; containerization has made it possible for this figure to rise to 30 tons per man-hour.[10] This greater efficiency was only achieved, however, by transforming what was once a labor intensive chore into a largely mechanical one. Hence workers' expectations of job security have come into conflict with management's desire to increase productivity.

Congress has not enacted a statutory scheme whose specific purpose is either to prevent or to resolve disputes between management and labor over how best to accommodate technological innovations in the workplace. As with most other aspects of American industrial relations, the problem of technological innovation has been left to the system of private ordering we know as collective bargaining.[11] A complete understanding of the controversies before us, therefore, requires not only a knowledge of the specific incidents that precipiated the disputes, but also an appreciation for the adjustments to containerized shipping that have been made through the collective bargaining process in the three port cities involved in these cases.

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[10] JA(B-HR) 1090a-1091a (before containerization, "an employer * * * thought he was doing good with 30 ton per gang of 22 men. We can now with the container handling method, with a crane, one crane, and a 20-man gang load as high as 600 tons per hour * * *.") ; *see* Ross, *supra* note 7, at 400 (one major shipper reports twentyfold increase in productivity).

[11] Other nations have made different choices. *See, e.g.,* Redundancy Payments Act 1965, *recodified in* Employment Protection Consolidation Act 1978 (British legislation that compensates workers who have been made "redundant" due to managerial initiative or technological innovation). For a critique of this Act, *see Fryer, The Myths of the Redundancy Payments Acts,* 2 Indus. L. J. 1 (1973).

A. *Containerization in the Ports of Baltimore and Hampton Roads*

CONASA represents constituent shipping associations, including the Hampton Roads Shipping Association (HRSA) and the Steamship Trade Association of Baltimore (STAB), in ports from Massachusetts to Virginia.[12] Since its formation in 1970 CONASA has bargained on behalf of its members with the ILA over certain key issues, including containerization, on a master-contract basis.[13] Prior to the formation of CONASA, North Atlantic ports generally adopted the master terms of the labor agreement for the Port of New York.[14]

Due in large measure to the controversy surrounding containerization, the negotiation in New York of the 1968 collective bargaining agreement was a bitter affair that occasioned a strike of nearly two months' duration by members of the ILA.[15] The implications of this dispute for the national economy were sufficiently far-reaching to involve mediators appointed by the President

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[12] 231 N.L.R.B. at 358.

[13] *Id.* at 360.

[14] JA(B-HR) 1092a-1093a.

[15] JA(NY) 95a (rejected affidavit of John M. Haynes, Executive Vice President of NYSA). The strike lasted over 100 days in other ports on the Atlantic and Gulf coasts. *Id.*

Because the Administrative Law Judge (ALJ) in No. 78-1510 (NY) believed that the case before him was controlled by *International Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977), he refused to permit the petitioners here to adduce and develop virtually any facts in their defense. *See* ALJ's Order Striking All Affirmative Defenses, JA (NY) 47a-51a; ALJ's Order Rejecting Evidence and Closing Hearing, JA(NY) 52a-53a. Accordingly, proffered affidavits that were rejected by the ALJ, such as the one cited in this footnote, will be noted as such.

of the United States in the dispute's resolution.[16] Part of the agreement that finally emerged in 1968 was a set of rules, known as the Rules on Containers, which represented the compromise reached between management and labor on the containerization issue. The 1968 New York agreement, whose master terms were adopted that year by other ports on the North Atlantic coast, marks the first time that the Rules on Containers were included in the labor contracts in Hampton Roads and Baltimore.[17]

Containerized shipping was first introduced in Baltimore and Hampton Roads in 1965 and 1966,[18] but did not have a substantial impact on work patterns in these ports until the late 1960s and early 1970s, by which time the Rules were adopted. For example, the first crane used to move containers to and from ships was erected in Hampton Roads in 1968 or 1969.[19] And, as a further example, one major shipper, United States Lines, moved

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[16] *See Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884, 888 (2d Cir. 1970) ("In the course of the controversy preceding the execution of the [1968-71 collective bargaining agreement], a Taft-Hartley 80-day injunction was granted and the Board of Inquiry set up in connection with that injunction stated in its report to the President that containerization was the 'most urgent item' of difference between the parties.").

[17] The Rules on Containers as included in the 1968 Hampton Roads agreement are reproduced at JA(B-HR) 529a-531a. The Rules as included in the 1968 Baltimore agreement are reproduced at JA(B-HR) 553a-555a. The Rules as included in the 1968 New York master contract are discussed in respondent's brief (NY) at 6. Any differences among the three versions are, for present purposes, insignificant. The 1968 Rules for Hampton Roads are reprinted in Appendix A to this opinion.

[18] *See* 231 N.L.R.B. at 359; JA(B-HR) 78a, 462a-463a, 1023a, 1091a.

[19] JA(B-HR) 1112a.

only "a handful"[20] of containers through the Port of Baltimore in 1965, about 4,000 ccontainers in 1969, and 25,000 just a few years later in 1973.[21] Thus, although the 1968 Rules on Containers were the parties' collectively bargained response to containerization—and, as such, postdated rather than antedated the advent of containerization—there was in fact no significant time lag between the technological development and the parties' collectively bargained response to it.

To understand the scope of the Rules on Containers, we must first appreciate the different ways in which container loads of cargo are classified. A "consolidated full container load" (CFCL) consists of shipments consolidated into a single container whose cargo belongs to more than one consignee. A "less than trailer load" (LTL) or a "less than container load" (LCL) also refers to a container whose cargo belongs to more than one consignee. A "full shippers' load" (FSL) or "shippers' load," in contrast, is a container of cargo from one shipper to a single beneficial owner consignee.[22] The controversy in Baltimore and Hampton Roads centered on the stripping and stuffing—packing and unpacking—of FSL containers.

It appears that in the Ports of Hampton Roads and Baltimore, in the few years between introduction of containerized shipping and adoption of the Rules on Containers, ILA labor stripped consolidated container loads at the pier.[23] Unless ILA stripping was requested by the

[20] 231 N.L.R.B. at 354 n.8 (Fanning, Chairman, dissenting).

[21] *Id.* at 362.

[22] 231 N.L.R.B. at 359; JA(B-HR) 68a-69a. This opinion uses the terms "FSL" and "shippers load" interchangeably, and will often refer to LTL, LCL, and CFCL cargo by the generic term "consolidated container loads." Also, the term "shipper" is used to refer to a shipping company that is a member of a CONASA shipping association.

[23] 231 N.L.R.B. at 359.

consignee's agent or by the stevedore, however, shippers' loads were placed by ILA labor on the pier, where truckmen would then pick up the FSL container intact either to deliver it to the beneficial owner or to store the cargo.[24] The 1968 Rules were to an extent a formalization of these work practices. The Rules provided that ILA labor at the pier was to strip and stuff consolidated container loads that came from or were destined for any person who was not the beneficial owner of the cargo and who was located within 50 miles of the port.[25] The Rules further provided that a shipping company had to pay liquidated damages for each of its containers not handled in accordance with the Rules.[26] And for each container, including FSL containers, that passed over the docks without stripping or stuffing by longshoremen, the shipper was required to pay a royalty into an ILA fund.[27]

The 1968 Rules on Containers expired with the rest of the collective bargaining agreement in 1971, at which time further labor-management conflict over the containerization issue ensued.[28] By this time CONASA was bargaining on behalf of HRSA and STAB. The ultimate compromise reached by CONASA and the ILA on containerization, after another long strike, was to retain the same rules for handling containers and for paying roy-

[24] *Id.* at 359-360.

[25] *See* Title I (introductory title to 1968 Rules on Containers entitled "Containerization"), *reprinted in* Appendix A *infra.*

[26] *See* Rule C.5 (liquidated damages clause in 1968 Hampton Roads Rules on Containers providing for damages of $150 per container), *reprinted in* Appendix A *infra.* Liquidated damages were $250 per container both in Baltimore, JA(B-HR) 555a, and in New York, respondent's brief (NY) at 6.

[27] *See* 231 N.L.R.B. at 360; JA(B-HR) 94a-95a, 146a-147a, 302a, 555a.

[28] JA(NY) 101a (rejected affidavit of John M. Haynes).

alties as were embodied in the 1968 agreement, except that the 1971 agreement provided for an increase in liquidated damages for rule infractions.[29]

As can be seen, the Rules in existence from 1968 to 1974 did not in terms require that ILA labor handle FSL cargo at the pier. But the Administartive Law Judge (ALJ) found that, "[b]eginning in 1969, following the execution of the 1968 agreement, ILA longshoremen stripped full shippers' loads which were to be delivered to a warehouse for storage within a 50-mile radius of the center of the port. ILA freight handlers loaded the freight onto trucks for delivery to the warehouse."[30] Yet FSL containers whose cargo was not to be warehoused were frequently stripped by truckers at their terminals within the port area before delivery of the cargo to its beneficial owner—a practice known as "shortstopping."[31] Although there is some indication that labor-management Container Committees, established to administer the Rules,[32] considered this practice a violation of the Rules by the shipper that turned over the container,[33] it is

[29] Liquidated damages were increased to $1,000 per container in both ports. The Rules on Containers as included in the 1971-1974 Hampton Roads and Baltimore agreements are reproduced at JA(B-HR) 534a-536a and JA(B-HR) 556a-559a, respectively.

[30] 231 N.L.R.B. at 360.

[31] *Id.* at 362 ("The motor carrier's decision to strip the full shipper's load may rest upon consideration of economy, safety, or state highway and bridge regulations.").

[32] *See* Rule C.7, *reprinted in* Appendix A *infra.*

[33] 231 N.L.R.B. at 362; JA(B-HR) 150a, 318a, 354a, 475a, 998a, 1032a, 1035a-1036a, 1108a-1109a, 1140a-1143a. The Committees apparently believed that FSL containers were not expressly covered by the Rules because these containers are consigned directly to their beneficial owners and thus, unlike CFCL, LTL, and LCL containers, inherently involve no stripping prior to delivery

(footnote continued on following page)

clear that most shortstopping was not detected by the Committees.[34]

In January 1973 a labor-management committee issued an interpretation of the Rules (the "Dublin Supplement") that brought shortstopped shippers' loads within the scope of the Rules.[35] Under the Supplement truckmen were permitted to haul FSL containers of import cargo directly to a warehouse in the port area for stripping only when the freight would be stored there for at least 30 days.[36]

The Rules on Containers included in the agreement negotiated in 1974 sought to formalize practice with respect to FSL cargo along the lines of the 1968 and 1971 agreements and the Dublin accord.[37] As the ALJ found,

(footnote continued from preceding page)

of the cargo to its beneficial owner. Where this is not the case because shortstopping occurs, it would follow that FSL containers come within the scope of the Rules. *See* 231 N.L.R.B. at 355 (Fanning, Chairman, dissenting) ("The traditional exemption for shippers' loads was premised on the understanding that such loads are 'through' containers, much larger in size but properly analogous to a single item of bulk cargo. When taken to a trucker's warehouse to be stripped and repacked, they lose that identity.").

[34] 231 N.L.R.B. at 362.

[35] The Dublin Supplement is reproduced at JA(B-HR) 549a.

[36] 231 N.L.R.B. at 360; JA(B-HR) 260a-261a, 549a-551a, 1027a-1028a, 1034a. In dissent Chairman Fanning contended that the Dublin Supplement carved out an exception to the stuffing and stripping rights of the ILA with respect to *all* FSL containers stuffed and stripped within 50 miles of port by other than the employees of the cargo's beneficial owner. 231 N.L.R.B. at 355 n.11 (Fanning, Chairman, dissenting). Chairman Fanning's colleagues in the majority, however, flatly disagreed with his characterization. *Id.* at 352. The proper characterization of the Dublin Supplement, whatever it may be, is not germane to our decision.

[37] The Rules on Containers as adopted in the 1974 Baltimore and Hampton Roads agreements are reproduced at JA(B-HR) 561a-563a and JA(B-HR) 537a-543a, respectively. Because they differ in some significant respects from the 1968 and 1971 Rules, the 1974 Rules are reproduced in Appendix B to this opinion.

"Under the 1974-77 container rules, ILA labor is entitled to strip full shippers' loads, whenever such work is to be done within a 50-mile radius of the center of the port by other than the consignee's employees."[38] But FSL cargo consigned to the beneficial owner's place of business or warehoused for at least 30 days within the port area was not to be stripped by the ILA;[39] instead, the ILA would continue to receive a royalty for each container not handled by longshoremen.

Thus under the 1974 Rules, assuming that the Dublin Supplement's warehousing exception was not applicable, when employees of a trucking company before delivering FSL cargo to its beneficial owner stripped an FSL container at the company's off-pier terminal and that terminal was located within 50 miles of port, the shipping line that turned over its FSL container to the truckmen became liable for liquidated damages of $1,000 per container.

B. *Containerized Shipping in the Port of New York*

Containerized transport was first introduced in the Port of New York during the 1950s.[40] In New York, as in Baltimore and Hampton Roads, the general practice prior to containerization was for ILA labor to handle cargo piece by piece.[41] The longshoremen would load export cargo on pallets[42] and would unload and sort im-

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[38] 231 N.L.R.B. at 361. *See* Rule 1(a), *reprinted in* Appendix B *infra.*

[39] *See* Rule 2, *reprinted in* Appendix B *infra.*

[40] JA(NY) 83a-89a (rejected affidavit of John M. Haynes).

[41] *Id.*

[42] A pallet is a portable platform designed for handling by forklift truck or crane and used for movement of goods.

port cargo in preparation for delivery.[43] These work practices began to change in the late 1950s with the introduction of containerization. And with the challenge to existing work practices came increased labor-management conflict. Predictably, management wished to secure the efficiency gains represented by containerized shipping as soon as possible; equally predictably, the ILA wished to fulfill its members' expectations of job security.[44]

The ILA-NYSA collective bargaining agreement negotiated in 1959 was the first to contain a provision dealing with containerized shipping. At that point containerization had not yet become widespread in New York. Indeed, by one report the first fully containerized vessel was not introduced into the busy North Atlantic trade route until 1967.[45] It was nevertheless thought necessary by the parties in 1959 to achieve some level of agreement on how containerized shipping would be handled.

The 1959 collective bargaining agreement expressly recognized the right of shippers belonging to the NYSA to use containers of any kind or size without ILA restrictions that would cause the containers to be stripped and restuffed at the pier.[46] There were, however, two caveats. First, the NYSA agreed to make royalty payments to a jointly administered fund for each shippers' load container that was stuffed or stripped away from the pier by non-ILA labor.[47] Second, the agreement also stipulated that

> [a]ny work performed in connection with the load-

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[43] JA(NY) 83a-85a (rejected affidavit of John M. Haynes).

[44] JA(NY) 88a-90a (rejected affidavit of John M. Haynes).

[45] JA(NY) 95a (rejected affidavit of John M. Haynes). *See International Longshoremen's Ass'n,* 221 N.L.R.B. 956, 957 (1975).

[46] JA(NY) 90a-91a (rejected affidavit of John M. Haynes).

[47] JA(NY) 91a (rejected affidavit of John M. Haynes).

> ing and discharging of containers for employer members of the NYSA which is performed in the Port of Greater New York whether on piers or terminals controlled by them, or whether through direct contracting out, shall be performed by ILA labor at longshore rates.[48]

Applying these terms to actual dockside disputes proved to be an arduous process fraught with difficulties. In particular, the language of the second caveat was sufficiently imprecise to require a clarification which, according to the NYSA, was issued by that shippers' association on February 28, 1962:

> Where an employer member of NYSA supplies a container which is the property of such member, to a consolidator for loading or discharging of cargo in the Port of Greater New York, it will be stipulated that such container must be loaded or unloaded by ILA at longshore rates.[49]

As the 1960s passed, containerized shipping in the Port of New York became more widespread and ILA hostility to the innovation more pronounced. With the 1968 negotiations looming, the ILA, at its 1967 convention, assumed a hard-line position on containerization: *All* containers were to be stuffed and stripped by ILA labor at longshore rates,[50] or there was to be trouble. And trouble

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[48] *Id.*

[49] JA(NY) 92a (rejected affidavit of John M. Haynes). According to the ALJ in *International Longshoremen's Ass'n,* 221 N.L.R.B. 956 (1975), "[t]here is substantial conflict" over whether this clause and its predecessor aimed to secure LTL, LCL, and CFCL stripping and stuffing for ILA labor. *Id.* at 968. The Board itself in that case apparently believed that the provisions did not go that far. *Id.* at 960.

[50] JA(NY) 95a (rejected affidavit of John M. Haynes).

there was. The prolonged strike, mentioned above in the context of the situations in Baltimore and Hampton Roads, ensued and was terminated only after the appointment of a Presidential Board of Inquiry pursuant to the national emergency provisions of the Taft-Hartley Act.[51] The compromise ultimately struck between the parties was the same Rules on Containers that were adopted as master terms in Baltimore and Hampton Roads. Shippers' loads and other containers that came from or went to points 50 or more miles from the Port of New York were not subject to ILA stuffing or stripping requirements.[52] CFCL, LTL, and LCL containers to be stuffed or stripped within 50 miles of port—the containers at issue in this New York case—were, however, to be stuffed or stripped by ILA labor.[53]

The seemingly chronic dockside labor problems attributable to containerization continued to flare up. The 1971 collective bargaining agreement left intact the Rules adopted in 1968, but this compromise was agreed upon only after another long strike.[54] Further discord ensued, and the ILA and CONASA, which by this time had begun bargaining for the NYSA on matters pertaining to containerization, issued their Dublin Supplement in 1973 deal-

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[51] 29 U.S.C. § 171 *et seq.* (1976).

[52] [T]he employers won the right to continue to move most containers, namely non-consolidated full shipper loads, without stuffing or stripping by union members. Thus, manufacturers' loads or full shippers' loads, as well as all containers coming from or going to points fifty or more miles from a port, constituting 80% of the containers moving in the Port of Greater New York, were excluded from the stuffing and stripping requirements. * * *
JA(NY) 97a (rejected affidavit of John M. Haynes).

[53] *See* Title I (introductory title to 1968 Rules on Containers entitled "Containerization"), *reprinted in* Appendix A *infra.*

[54] JA(NY) 101a (rejected affidavit of John M. Haynes).

ing with FSL containers and warehousing in the port area.[55] The collective bargaining agreement adopted in 1974 also included Rules on Containers, the final version of which manifested an intention to carry on the agreement reached in 1968 and 1971 along with the Dublin accord.[56]

C. *The Role of Truckers and Consolidators Before and After the Advent of Containerized Shipping*

The charging parties before the NLRB were the following common carriers: Houff Transfer, Inc. (Houff) and Associated Transfer, Inc. (Associated) in the case originating in Baltimore and Hampton Roads, and Dolphin Forwarding, Inc. (Dolphin) and San Juan Freight Forwarders, Inc. (San Juan) in the case originating in New York.[57] Because these charging parties alleged that secondary activities of the ILA and of CONASA and its members, including the NYSA, threatened to deprive them

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[55] *See* text at notes and notes 35-36 *supra;* JA(NY) 19a (NLRB Order Consolidating Cases, etc.).

[56] The relevant provisions of the 1974 Rules in New York are reproduced at JA(NY) 16a-23a and are substantially identical to the Rules adopted in Baltimore and Hampton Roads. *See* Appendix B *infra.*

Subsequent to adoption of the 1974 collective bargaining agreement, but before its termination, conflict arose between the ILA and the shippers over whether the shippers had been abiding by the Rules. The ILA announced its intention to reopen the Rules, *see* Rule 8, *reprinted at* Appendix B *infra,* and later unilaterally suspended the Rules and began to strip all containers with the exception of shippers' loads bound for destinations outside the port area. Later, the parties resolved their differences and reinstituted the Rules in clarified form. *See* JA(NY) 108a (rejected affidavit of John M. Haynes).

[57] Houff and Associated are interstate common carriers licensed by the Interstate Commerce Commission (ICC); Dolphin and San Juan possess no such license.

of part of their traditional work, we must briefly review what their traditional role has been with respect to the cargo at issue.

1. *Baltimore and Hampton Roads*

Houff and Associated are ICC-licensed interstate common carriers whose work includes transporting cargo by truck to and from the Ports of Baltimore and Hampton Roads.[58] Both carriers have terminals within 50 miles of the Port of Hampton Roads, and Houff has a terminal in Baltimore.[59] Prior to containerization, Houff, Associated, and other trucking companies made trips to the piers in Baltimore and Hampton Roads to pick up loose cargo which had been unloaded and sorted by ILA labor.[60] The cargo would then be transported by the trucking companies to their trucking stations, to their warehouses, or directly to the consignee.

Since the advent of containerization in these ports, about 1965, truckmen regularly have transported FSL container loads to beneficial owner consignees both within and beyond 50 miles of the Ports of Baltimore and Hampton Roads.[61] Prior to adoption of the 1968 collective bargaining agreement, which was the first in Baltimore and Hampton Roads to speak to the containerization issue, truckmen also picked up FSL containers at the pier, unstripped by ILA labor, and transported them to a nearby warehouse for stripping and storing.[62] Subsequent to the Rules' adoption in 1968, FSL containers whose cargo was

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[58] 231 N.L.R.B. at 358, 361 *et seq.*

[59] *Id.* at 358.

[60] *Id.* at 359.

[61] *Id.* at 361; JA(B-HR) 191a-192a.

[62] 231 N.L.R.B. at 360.

to be stripped and warehoused in the port area were stripped by ILA labor,[63] but truckmen frequently picked up FSL containers and stripped them at their terminals when the cargo was not to be warehoused.[64] The record indicates that at least some personnel within the trucking industry were aware that this shortstopping of FSL containers within 50 miles of the port was regarded as a violation of the Rules on Containers committed by the shippers.[65]

2. *New York*

In the New York case Dolphin and San Juan employed subcontracted labor to consolidate various customers' goods by placing them into containers in preparation for shipment by sea.[66] Both companies had inland facilities within a 50-mile radius of the Port of New York.[67] The work done by Dolphin and San Juan that caused NYSA shippers to violate the Rules on Containers in the view of the Container Committee was consolidation of cargo belonging to two or more individuals into containers

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[63] *Id.*

[64] *Id.* at 362 ("The motor carrier's decision to strip the full shipper's load may rest upon consideration of economy, safety, or state highway and bridge regulations."). *See* JA(B-HR) 154a-155a, 180a-182a, 231a, 267a-268a. *See also* text at note 31 *supra.*

[65] 231 N.L.R.B. at 352 ("These [trucking industry] officials testified only that [CONASA and the ILA] and certain shipping personnel deemed these actions to be violations, not that they actually were violations, or that the trucking industry acknowledged them to be such."); *see id.* at 356 n.22 (Fanning, Chairman, dissenting).

[66] 98 L.R.R.M. at 1277.

[67] *Id.*

owned or leased by the shippers. FSL cargo is not at issue in this New York case.

Dolphin's operations antedated the adoption of the Rules on Containers by several years, although the ILA and the NYSA, as we have seen, had been negotiating over containerization since the late 1950s.[68] NYSA shippers contend that they did business with Dolphin only because Dolphin listed Massachusetts as the point of origin for the containers it filled instead of the actual point within the port area.[69] San Juan was established in 1972, several years after the Rules on Containers were first adopted.[70] The containers shipped by San Juan apparently indicated Chicago as the point of origin of the containers, although they in fact were consolidated in the New York area.[71]

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[68] *See* text at notes 46-49 *supra.*

[69] Petitioners' brief (NY) at 17-18; *see* JA(NY) 120a-121a (rejected affidavit of William O. Gohlke, former officer of Sea-Land Services, Inc. and Seatrain Lines, Inc.):

> It was quite apparent to me that though the bills of lading and other documentation suggested that the Dolphin cargo was booked as having an originating point in Massachusetts, this was not the case. The recordings of the turnaround of containers and related equipment issued on Dolphin bookings clearly showed that insufficient time elapsed between the issuance and return of the equipment to permit the containers to be transported to Massachusetts and back. This left the unmistakable impression that the loading of the containers had to have taken place in the New York-New Jersey proximity of the Seatrain operation. It was not Seatrain's concern or my concern as an official of Seatrain to inquire into this practice. Seatrain's and my objective was to obtain business and transporting containers to and from Puerto Rico. • • •

[70] JA(NY) 164a.

[71] JA(NY) 156a-174a.

D. *The Incidents Precipitating the Present Disputes*

1. *Hampton Roads*

On September 24, 1974 Associated picked up eight FSL containers from United States Lines at a Norfolk pier and hauled them to its Virginia Beach terminal, where it stripped them.[73] Representatives of United States Lines and the ILA, upon inspection of Associated's terminal, determined that, because of Associated's shortstopping of the containers, United States Lines was in violation of the Rules on Containers.[73] The HRSA-ILA Container Committee later ratified their determination.[74] Liquidated damages of $1,000 per container were imposed on United States Lines, which demanded reimbursement from Associated.[75] Upon the refusal of Associated to comply with the demand, United States Lines severed business relations with Associated.[76]

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[73] 231 N.L.R.B. at 363; JA(B-HR) 195a-196a. Apparently the documentation presented to United States Lines by Associated did not indicate that the containers would be stripped at Associated's terminal by Associated's employees. There is no mention in the correspondence subsequent to the incident that the documentation presented to United States Lines served to notify the shipper of Associated's intention to strip the container, JA(B-HR) 655a-661a, and the ALJ merely noted that the consignees, whose names and locations would have been found on the delivery orders and bills of lading, were located in Tennessee and North Carolina, 231 N.L.R.B. at 363. *See id.* at 356 n.18 (Fanning, Chairman, dissenting) ("[W]hen a container is released to a motor carrier, the delivery order specifies that the cargo is to be transported to the consignee. Intent to shortstop is thereby difficult to ascertain * * *.").

[73] 231 N.L.R.B. at 363.

[74] *Id.* The ruling was based on Rules 1(a)(3) and 2B.(2), *reprinted in* Appendix B *infra.*

[75] 231 N.L.R.B. at 363.

[76] *Id.*

2. *Baltimore*

On September 24, 1974 Houff picked up in the Port of Baltimore two FSL containers from United States Lines and one from Lavino Shipping Company and transported them to its terminal in the Baltimore area for stripping before delivery of the cargo to the respective owners.[77] Once it was determined that this shortstopping took place, United States Lines and Lavino were assessed $1,000 per container by the STAB-ILA Container Committee, as stipulated by the Rules on Containers, and sought indemnification from Houff.[78] When the trucking company did not indemnify the two shippers, they ceased doing business with Houff.[79]

3. *New York*

Dolphin and San Juan engaged in consolidation of CFCL, LCL, and LTL cargo into containers within 50 miles of the Port of New York.[80] When this practice was discovered, the NYSA shippers that had been supplying Dolphin with containers—Maritime Transportation Management, Inc. (MTM) and Transamerica Trailer Transport, Inc. (TTT)—were fined $4,000 and $43,000, re-

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[77] *Id.* at 362. Apparently the documentation presented to United States Lines and to Lavino did not indicate that the containers would be stripped at Houff's terminal by Houff's employees. *Id.* ("The delivery order and bill of lading issued to Houff for the U.S. Lines containers showed the cargo was destined to Union Carbide Corporation, Alloy, West Virginia"); JA(B-HR) 1052a. *Compare* 231 N.L.R.B. at 356 n.18 (Fanning, Chairman, dissenting).

[78] 231 N.L.R.B. at 362. The ruling was based on Rules 1(a)(3) and 2B(2), *reprinted in* Appendix B *infra.*

[79] 231 N.L.R.B. at 362-363.

[80] 98 L.R.R.M. at 1277.

spectively, in liquidated damages.[81] As a result of the imposition of these damages, MTM and TTT refused to furnish the consolidators with any additional containers.[82]

II. Secondary Boycotts, Work Preservation, and the Rules on Containers

The common carriers, charging parties before the NLRB, argued successfully there that certain of the Rules on Containers and efforts by the ILA to enforce those Rules violated the congressional proscription of secondary boycotts.[83] Petitioners here contend that the Rules and action supporting the Rules had a legal primary purpose—work preservation—and that the NLRB committed an error of law in holding otherwise. To respond to these contentions we must peruse the law of secondary boycotts, including the work preservation doctrine, and determine whether the Board applied a proper understanding of the law to the cases before us.

A. *The Proscription of Secondary Boycotts*

The NLRA's proscription of secondary boycotts is premised on the distinction between primary and secondary union activity.[84] As fundamentally important as

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[81] *Id.*; JA(NY) 25a (NLRB Order Consolidating Cases, etc.). The ruling was based on Rule 1(a)(1), *reprinted in* Appendix B *infra.*

[82] 98 L.R.R.M. at 1277.

[83] The precise Rules challenged were those that were held applicable to the respective charging parties' activities. *See* notes 74, 78 & 81 *supra.*

[84] *See generally* Lesnick, *Job Security and Secondary Boycotts: The Reach of NLRA §§ 8(b)(4) and 8(e)*, 113 U. Pa. L. Rev. 1000, 1004-1018 (1965) (describing "relevance and content" of the primary-secondary dichotomy).

this distinction is, however, "it does not present a glaringly bright line."[85] Indeed, both the NLRB and the courts, in interpreting the congressional mandate prohibiting secondary activity, have necessarily undertaken, as Justice Frankfurter put it, the task of drawing lines "more nice than obvious."[86]

The relevant statutory provisions are Sections 8(b)(4)(B) and 8(e) of the NLRA.[87] The former—once described as "surely one of the most labyrinthine provisions ever included in a federal labor statute"[88]—prohibits unions and their agents from engaging in activities the object of which is forcing one employer to cease doing business with another.[89] Although the statutory language does not in terms focus on secondary activity,[90] both the

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[85] *Local 761, IUERMW v. NLRB*, 366 U.S. 667, 673 (1961) (opinion of Frankfurter, J.).

[86] *Id.* at 674.

[87] 29 U.S.C. §§ 158(b)(4)(B), (e) (1976).

[88] Aaron, *The Labor-Management Reporting and Disclosure Act of 1959 (pt. 2)*, 73 Harv. L. Rev. 1086, 1113 (1960).

[89] *See* Lesnick, *The Gravamen of the Secondary Boycott*, 62 Colum. L. Rev. 1363, 1364 (1962).

[90] (b) Unfair labor practices by labor organization
It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services;

(footnote continued on following page)

legislative history[91] and a proviso that the prohibition does not apply to "any primary strike or primary picketing"[92] make clear the cardinal importance of the primary-secondary distinction. The latter provision, Section 8(e),[93] proscribes not secondary activity, but "collective-bargaining contracts whereby the employer ceases or agrees to cease doing business with any other person."[94] Although the provision literally prohibits any understand-

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> or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> • • • •
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representatives of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing[.]

29 U.S.C. § 158(b)(4)(B) (1976).

[91] *See, e.g.,* S. Rep. No. 105, 80th Cong., 1st Sess. 22 (1947), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 at 428 (1948) (hereinafter cited as LEGISLATIVE HISTORY).

[92] 29 U.S.C. § 158(b)(4)(B) 1976).

[93] 29 U.S.C. § 158(e) (1976).

[94] *NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters,* 429 U.S. 507, 517 (1977).

ing aimed at forcing a cessation of business,[95] it is clear that this proscription of "hot cargo" agreements embodies the same distinction between lawful primary and unlawful secondary activity as Section 8(b)(4)(B), and applies only to agreements with secondary objectives.[96]

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[95] It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

29 U.S.C. § 158(e) (1976).

[96] *See NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters,* 429 U.S. 507, 517 (1977) (provision interpreted "as having no broader reach than § 8(b)(4) itself"); *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612, 620, 623-629 (1967).

The general aim of Congress in passing these prohibitions is clear: that is, according to one commentator, "to protect neutral employers—those not directly involved in a labor dispute—from direct union sanctions."[97] The Senate Report accompanying the Taft-Hartley Act casts this general purpose in only slightly more specific terms: Congress sought to proscribe "a strike against employer A [the secondary employer] for the purpose of forcing that employer to cease doing business with employer B [the primary employer] * * * (with whom the union has a dispute)."[98] Unfortunately, attempts to characterize congressional intent with any more specificity have not been notably successful.[99] Nevertheless, the NLRB and the courts are required in the course of deciding cases to apply the general congressional proscription in various specific contexts:[100] in cases, for example, where there are ally employers;[101] in common situs situations;[102] in

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[97] H. WELLINGTON, LABOR AND THE LEGAL PROCESS 275 (1968).

[98] S. Rep. No. 105, 80th Cong., 1st Sess. 22 (1947), *reprinted in* LEGISLATIVE HISTORY, *supra* note 91, at 428.

[99] Professor Cox, for example, after reviewing the possibilities presented under the current legislation, concluded that the problems in applying the secondary boycott provisions "can be minimized by more careful statutory classification." A. COX, LAW AND THE NATIONAL LABOR POLICY 38 (1960).

[100] *See, e.g.*, Goetz, *Secondary Boycotts and the LMRA: A Path Through the Swamp*, 19 KANS. L. REV. 651, 658-703 (1971) (describing the various contexts in which secondary boycotts occur).

[101] *See, e.g., NLRB v. Business Mach. & Office Appliance Mechanics Conf. Board*, 228 F.2d 553, 559 (2d Cir. 1955) ("We therefore hold that an employer is not within the protection of § 8(b) (4) [(B)] when he knowingly does work which would otherwise be done by the striking employees of

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consumer picketing cases;[103] and in the context of work preservation agreements.[104] The last of these contexts is the one with which we are presented here.

B. *The Supreme Court's Work Preservation Doctrine:* National Woodwork *and* Pipefitters

An immutable feature of modern industrial economies is their dynamism. In large part this is due to the profound impact that technological advances have on the means of production. One can turn to any sector of our economy—from communications to transportation to food processing—and witness the blinding speed with which modern technology can alter our conception of the status quo.

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the primary employer and where this work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations.'').

[102] *See, e.g., Local 761, IUERMW v. NLRB, supra* note 85, 366 U.S. at 680-682 (the portion of the struck employer's premises used by employees of independent contractors who perform tasks connected to the normal operations of the struck employer are not exempted from strike activity by the struck employer's employees under § 8(b) (4) [(B)]).

[103] *See, e.g., NLRB v. Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 71-72 (1964) (picketing confined to persuading customers to cease buying the product of the primary employer is not proscribed by § 8(b) (4) (ii) (B)).

[104] *See, e.g., NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters*, 429 U.S. 507, 517 (1977) ("Section 8(e) does not prohibit agreements made for 'primary' purposes, including the purpose of preserving for the contracting employees themselves work traditionally done by them."). Alleged hot cargo clauses may have application in areas other than work preservation, but these are of no concern here. *See* GOETZ, *supra* note 100, 19 KANS. L. REV. at 683-684.

It is inevitable that such rapid change will cause cleavages within a society; one example is the displacement of workers whose jobs and skills are tied to supplanted forms of technology. As mentioned earlier, there is no legislative scheme in this country designed specifically to deal with labor disputes engendered by technological innovations.[105] Such disputes instead are channeled into the system of collective bargaining; the labor relations questions raised by changes in the means of production are answered by the parties themselves rather than through state intervention.[106]

The courts in this country, including the Supreme Court, have wisely allowed for resolution of such disputes through the collective bargaining process even though the resolutions agreed to by the parties often tread perilously close to the congressional proscription of secondary boycotts.[107] The classic example of such a resolution is an

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[105] One commentator has lamented that "[t]he pressures created by momentous problems of productivity and job security under changing technological and market conditions are contained or released by no more sensitive a legal instrument than a legislative determination to protect neutrals from being drawn into the disputes of others." Lesnick, *supra* note 84, 113 U. PA. L. REV. at 1041.

[106] An interesting contrast is Great Britain, which not only has a system of compensation designed to alleviate the strain on workers who are made "redundant," *see* note 11 *supra,* but which also has attempted to solve its version of the containerization controversy through direct parliamentary intervention. *See* Dock Work Regulations Act 1976.

[107] The leading Supreme Court cases are discussed in text at notes 109-132 *infra.* For cases from the Courts of Appeals, *see, e.g., American Boiler Manufacturers Ass'n v. NLRB,* 404 F.2d 547, 561 (8th Cir. 1968), *cert. denied,* 398 U.S. 960 (1970) (no violation of the NLRA's prohibition of secondary boycotts when the union's conduct was addressed to enforce-

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agreement by the parties to preserve work for the contracting employer's employees when the nature or the location of that work has changed due to technological advances. Inescapably the effects of such agreements are felt upon employers (and their employees) other than the contracting employer. But those effects are incidental to the agreement with the contracting employer and not necessarily reflective of a secondary objective such as organizing the employees of the other affected employers. Thus under the NLRA's proscription of secondary boycotts, these work preservation agreements, as well as primary collective action enforcing their terms, are not considered illegal.[108]

The validity of such agreements under the NLRA is supported by sound policy reasons. First, it is of paramount importance that Congress, rather than imposing a solution, has chosen to allow the parties themselves to deal with labor problems generated by technological change. If the courts and the NLRB were to upset reasonable efforts by the parties to achieve some level of accommodation, this broad policy choice of Congress would be frustrated. Second, unwarranted interference

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ment of its collective bargaining agreement, when the conduct related solely to preservation of the traditional tasks of job-site plumbers, and when the union had no objectives elsewhere); *Meat & Highway Drivers, Dockmen, etc., Local 710 v. NLRB,* 335 F.2d 709, 713 (D.C. Cir. 1964) ("If the jobs are fairly claimable by the unit, they may, without violating either § 8(e) or § 8(b)(4)(A) or (B), be protected by provision for, and implementation of, no-subcontracting or union standards clauses in the bargaining agreements." (footnotes omitted)).

[108] *See* note 184 *infra* (citing cases); H. WELLINGTON, *supra* note 97, at 275 ("the [NLRA] does not interdict the primary strike *or its attendant consequences.*" (emphasis added; footnote omitted)).

by the NLRB and the courts could inject a massive dose of uncertainty into the planning functions of both management and labor. If the parties suspect that reasonable attempts to accommodate technological advances will be torn asunder by a reviewing agency or court, they will be reluctant to undertake the effort. Workers particularly could be obdurate when asked to compromise some degree of job security for the sake of efficiency if that compromise might later be cast aside. In the event of industrial disruption caused by such induced intransigence there would be no winners: not only would the workers lose work, but also the efficiency gains represented by the innovation would needlessly, if perhaps temporarily, be lost to management and to our national economy.

Two major Supreme Court cases control our understanding of the legality of work preservation agreements under the NLRA. The first is *National Woodwork Manufacturers Ass'n v. NLRB,*[109] a case in which a provision in a collective bargaining agreement was challenged under Section 8(e).[110] The contested clause stipulated that bargaining unit employees (carpenters) would not handle any doors that were "pre-fitted," *i.e.,* made ready for installation prior to shipment to the jobsite.[111] The object of this provision, according to the Administrative Law Judge, the Board, and ultimately the Supreme Court, was preservation of the fitting work performed traditionally by onsite carpenters.[112]

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[109] 386 U.S. 612 (1967).

[110] 29 U.S.C. § 158(e) (1976).

[111] 386 U.S. at 615-616.

[112] *Id.* at 645-646.

In upholding the provision the Court expounded upon the nature of the inquiry that courts and the NLRB must undertake when determining the legality of such agreements. "The determination • • • cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the contracting employer's] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere."[113] The Court continued: "The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees."[114] As one commentator has written of *National Woodwork,* "Since the object of the union was to preserve work for unit employees, and since it had no quarrel with the union status or other personnel relations of the door manufacturer, the contract provision was upheld."[115]

In a case decided in 1977 the Supreme Court once again confronted the work preservation issue, but with a

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[113] *Id.* at 644 (footnote omitted). The Court provided an elaboration of "all the surrounding circumstances" in a footnote:

> As a general proposition, such circumstances might include the remoteness of the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry. • • •

Id. at 644 n.38.

[114] *Id.* at 645 (footnote omitted).

[115] R. GORMAN, LABOR LAW 265 (1976). On the day *National Woodwork* was decided the Court also handed down a companion case. In *Houston Insulation Contractors' Ass'n v. NLRB,* 386 U.S. 664 (1967), the Court, relying largely on the reasoning in *National Woodwork,* held that a work preservation agreement between a company and a local union could be effectuated by another local of the same union. *See* R. GORMAN, *supra.*

different result. In *NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters,*[116] the Court refused to approve union activity in support of what appeared to be a work preservation clause. In *Pipefitters* a subcontractor on a construction project had agreed to the contested clause in its labor agreement with its steamfitter employees. Under the clause all pipe threading and cutting were to be performed on the jobsite by the steamfitters, who had traditionally performed this work.[117] This provision notwithstanding, the main contractor decided, and the subcontractor agreed, to order pre-threaded and pre-cut pipes for the job. The steamfitters refused to install the pipes, and a work disruption ensued.[118]

The NLRB, confronted with this factual situation, found that the contested clause had a primary purpose—work preservation[119]—but that the union's activity to enforce the agreement did not.[120] The NLRB's holding was premised on its "right to control" test, which is based on the determination whether the coerced employer —in *Pipefitters,* the subcontractor—could "control," *i.e.,* award, the work sought by the union.[121] If the coerced employer cannot control the work, then it follows that the union's actions are directed not at this employer, but at another employer who in fact does control the work.

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[116] 429 U.S. 507 (1977).

[117] *Id.* at 512.

[118] *Id.* at 511-513.

[119] 204 N.L.R.B. 760, 760 (1973).

[120] *Id.*

[121] 429 U.S. at 521. *See* R. DERESHINSKY, THE NLRB AND SECONDARY BOYCOTTS 117 (1972) ("Essentially, the test required that the employer have the right to control the matter at issue in order to be designated a primary employer.").

In *Pipefitters* the object of the strike was to obtain work controlled not by the subcontractor, with whom the steamfitters had agreed to the lawful work preservation clause, but by the main contractor; in the Boards' view this meant that the object of the boycott was secondary.[122]

The decision of the NLRB was set aside on appeal by this court,[123] but the Supreme Court reversed our decision.[124] In so doing the Supreme Court was exceedingly careful to cast its decision in terms of its reasoning in *National Woodwork.* As the Court discerned the issue in *Pipefitters,* for example, it turned on "whether the boycott was 'addressed to the labor relations of the contracting employer *vis-à-vis* his own employees.'"[125] This formulation of the issue corresponded to the Court's view of the scope of Section 8(e), which also came from *National Woodwork.* The provision "does not prohibit agreements made for 'primary' purposes, including the purpose of preserving for the contracting employees themselves work traditionally done by them."[126]

In holding that the strike in *Pipefitters* was unlawful secondary activity, the Supreme Court affirmed several points of law that merit reiteration here. First, the Court supported *National Woodwork's* admonition that courts and the NLRB examine "all the surrounding circumstances"[127] when assessing the validity of a work

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[122] 204 N.L.R.B. at 760.

[123] *Enterprise Ass'n of Steam, etc. Pipefitters v. NLRB,* 521 F.2d 885 (1975) (*en banc*), *rev'd,* 429 U.S. 507 (1977).

[124] 429 U.S. at 532.

[125] *Id.* at 511 (*quoting National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. at 645).

[126] *Id.* at 517 (*citing National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. at 635).

[127] 386 U.S. at 644.

preservation clause.[128] Second, the Court also affirmed *National Woodwork's* insistence that to be considered a legal attempt at work preservation the challenged boycott must focus on the "labor relations of the contracting employer *vis-à-vis* his own employees."[129] Third, the Court held that a provision in a collective bargaining agreement cannot itself immunize union activity that otherwise is secondary in character.[130] Fourth, the NLRB, according to the Court, was perfectly within the law in applying its right to control test as a means of delineating the scope of lawful primary activity.[131] Fifth, the Court reaffirmed that where the NLRB's decision is based on a proper understanding of the prevailing law, appellate review is confined to a determination of "whether the Board's findings were 'supported by substantial evidence on the record considered as a whole.' "[132]

Before applying these legal standards to the cases before us, we must make a brief excursus into the litigation history of the Rules on Containers.

C. *The Rules on Containers in the Courts*

The Rules on Containers have been the subject of extensive litigation over the past decade. The Second Circuit was the first Court of Appeals to adjudge the validity of the Rules when, in *Intercontinental Container Transport Corp v. NLRB (ICTC),*[133] a consolidator challenged the Rules as a conspiracy in restraint of trade

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[128] 429 U.S. at 524.

[129] 386 U.S. at 645, *quoted at* 429 U.S. at 511, 528.

[130] 429 U.S. at 514-521.

[131] *Id.* at 521-528.

[132] *Id.* at 531 (*quoting* 29 U.S.C. § 160(e) (1976)).

[133] 426 F.2d 884 (2d Cir. 1970).

and hence as violative of the Sherman Act.[134] To decide whether the Rules amounted to an antitrust violation the court had to determine whether the union's activities of bargaining for and enforcing the Rules fell within the labor exemption to the Sherman Act.[135] This determination rested in part on "whether the action is in the union's self-interest in an area which is a proper subject of union concern."[136]

The court had little difficulty in finding that the Rules were in the interest of the union and its members. Noting that the Supreme Court has repeatedly held that preservation of jobs is within the area of proper union concern,[137] the court concluded that "[t]he [Rules] have as their object the preservation of work traditionally performed by longshoremen covered by the agreement."[138] Rather than aiding a group of businessmen to violate the Sherman Act, "the union here, acting solely in its own self-interest, forced reluctant employers to yield to certain of its demands."[139] The agreement between management and labor on the containerization issue was held within the labor exemption to the antitrust laws.

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[134] 15 U.S.C. § 1 *et seq.* (1976).

[135] *See Amalgamated Meat Cutters v. Jewel Tea Co.,* 381 U.S. 676 (1965). For a recent statement of the Supreme Court's views on the labor exemption to the antitrust laws, *see Connell Constr. Co. v. Plumbers & Steamfitters, Local 100,* 421 U.S. 616 (1975).

[136] 426 F.2d at 887.

[137] *Id.* (*citing National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612 (1967); *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964); *Order of Railroad Telegraphers v. Chicago & Northwestern R. Co.,* 362 U.S. 330 (1960)).

[138] *Id.*

[139] *Id.* at 888.

After the Second Circuit's decision in *ICTC*, unfair labor practice charges were filed against the ILA and the NYSA by two off-pier consolidators that operated near the Port of New York. The charges alleged that the Rules on Containers were an agreement to engage in a secondary boycott—a "hot cargo" agreement—contrary to the NLRA[140] and that enforcement of the Rules by the ILA was also violative of the Act's proscription of secondary boycotts.[141] The Administrative Law Judge assigned to the case upheld the Rules as valid work preservation clauses, but he was reversed by the NLRB.[142] The ILA and the NYSA sought review of the NLRB's decision in the Second Circuit, which, in *International Longshoremen's Ass'n v. NLRB (Conex)*,[143] affirmed the Board.

The court noted its previous decision in *ICTC*, but found the holding in that case distinguishable because *ICTC* arose in an antitrust context.[144] In *Conex*, by contrast, the court believed that a measure of deference was owed the NLRB and that this factor allowed it to affirm the Board without directly overruling its decision in *ICTC*.[145] The NLRB, in reviewing the claim of the ILA

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[140] 29 U.S.C. § 158(e) (1976).

[141] 29 U.S.C. § 158(b)(4)(ii)(B) (1976).

[142] *International Longshoremen's Ass'n*, 221 N.L.R.B. 956 (1975).

[143] 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). Circuit Judge Feinberg dissented from the majority decision issued by Senior Circuit Judge Moore and Senior District Judge Wyzanski, sitting by designation.

[144] *Id.* at 708 n.1.

[145] Correspondingly, the District Court for the District of New Jersey, in a suit brought subsequent to the Second Circuit's decision in *Conex*, held that, just as an antitrust deter-

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and the NYSA that the Rules were valid under the Supreme Court's work preservation doctrine enunciated in *National Woodwork*, had found that the work at issue was not the loading and unloading of ships, the traditional work of the ILA, but the off-pier stripping and stuffing of containers.[146] In the relatively few years since the advent of containerization, off-pier stripping and stuffing of contaners had been performed by the employees of consolidators; hence the ILA was really engaged in work acquisition rather than work preservation.[147] This conclusion, according to the divided Second Circuit panel, was "supported by substantial evidence and by sound analysis."[148] The Board's order thus was enforced.

The First Circuit, in *International Longshoremen's Ass'n v. NLRB*,[149] reached a conclusion similar to that of the Second Circuit in *Conex*. The panel was presented with a dispute apparently generated by an expansive interpretation of the Rules by a Puerto Rican local of the ILA, Local 1575. Although observing that *Conex* was "strikingly similar" to its case,[150] the First Circuit went

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mination does not control a labor case, a labor law determination of unlawful work acquisition does not obviate the need for inquiry under the antitrust laws. The court denied summary judgment in favor of antitrust claims that grew out of *Conex*. *See Consolidated Express, Inc. v. New York Shipping Ass'n*, 452 F.Supp. 1024, 1036-1044 (D. N.J. 1977), *rev'd on other grounds*, —— F.2d —— (3d Cir. Nos. 78-1529 & 78-1530, decided April 16, 1979).

[146] 221 N.L.R.B. at 959.

[147] *Id.* at 959-961.

[148] 537 F.2d at 712.

[149] 560 F.2d 439 (1st Cir. 1977).

[150] *Id.* at 442-443.

on to note that "[t]he fact situation we face presents a slightly stronger case for enforcement under *National Woodwork* than did the situation considered by the Second Circuit."[151] The NLRB had found that Local 1575 wished to apply the Rules not only so that any consolidating work would be done by ILA labor at the pier, but also so that members of the local would displace the non-union employees at the consolidator's facilities.[152] Hence the union, through its local, had manifested an interest not only in work preservation, but also in union organization of the excluded employer. The union's interest in the labor relations of the excluded employer was in itself sufficient to make *National Woodwork's* work preservation exception to secondary boycotts inapposite.[153] Again, the Board's order was enforced.[154]

The Rules on Containers also have been reviewed by the Fourth Circuit in a case arising out of the instant proceeding in the Port of Hampton Roads. In *Humphrey v. International Longshoremen's Ass'n,*[155] that circuit vacated and remanded the District Court's order denying a temporary injunction sought by the Regional Director

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[151] *Id.* at 445.

[152] *Id.*

[153] *Id.* at 445-446.

[154] The First Circuit also discussed the Supreme Court's decision in *Pipefitters,* which was handed down just six days after oral argument in the First Circuit case. The First Circuit reasonably interpreted *Pipefitters* as supportive of the Board's discretion in assigning degrees of importance to the various circumstances involved in each case. 429 U.S. at 524. The First Circuit concluded that the Supreme Court's reasoning in *Pipefitters* "remove[s] any lingering doubts as to the enforceability of the Board's present order." 560 F.2d at 446.

[155] 548 F.2d 494 (4th Cir. 1977).

of the NLRB under 29 U.S.C. § 160(*l*) (1976).[156] The District Court had held that the NLRB did not have reasonable cause to believe that the Rules violated the NLRA.[157] The Fourth Circuit, however, found that the District Judge had erred because the work in controversy was not the ILA's traditional work of loading and unloading ships, but the off-pier work of stripping and stuffing containers.[158] Consequently, the court "conclude[d] that [the NLRB] ha[d] ample reasonable cause to believe that appellees are violating the Act."[159] The court ordered that on remand the District Court enter the appropriate injunction.

D. *Work Preservation and the Rules on Containers*

Under the Rules on Containers included in the 1974-1977 collective bargaining agreement, ILA labor was entitled to strip and stuff FSL containers whenever that work would otherwise be done within 50 miles of port by workers other than the employees of the cargo's beneficial owner.[160] Houff and Associated complained to the

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[156] 401 F.Supp. 1401 (E.D. Va. 1975), *vacated,* 548 F.2d 494 (4th Cir. 1977). *Compare* the District Court's conflicting decision in *Humphrey v. International Longshoremen's Ass'n,* D. Md. No. Y-75-1395, decided March 25, 1976 (unreported).

[157] 401 F.Supp. at 1407.

[158] Circuit Judge Craven dissented from the majority opinion authored by Circuit Judge Russell and joined by Chief Judge Markey of the United States Court of Customs and Patent Appeals, sitting by designation.

[159] 548 F.2d at 500 (footnote omitted).

[160] *See* Rules 1(a)(2), (3), and 2B.(2), *reprinted in* Appendix B *infra.* The Dublin Supplement, *discussed in* text at notes 35-36 *supra,* exempted from these provisions FSL containers whose cargo was to be stripped within the 50-mile radius and stored in a warehouse for at least 30 days. *See* Rule 2B.(4), *reprinted in* Appendix B *infra.*

NLRB that this provision and its enforcement by the ILA in the Ports of Baltimore and Hampton Roads allowed ILA labor to acquire work of Houff and Associated rather than to preserve work for members of the ILA. Also under the 1974-1977 Rules, ILA labor was entitled to stuff and strip all LCL, LTL, and CFCL containers that originated or terminated within 50 miles of port.[161] Dolphin and San Juan complained to the NLRB that this provision and its enforcement by the ILA in the Port of New York served to acquire work traditionally done by Dolphin and San Juan rather than to preserve work for members of the ILA. To decide whether the NLRB's receptivity to these charges was well founded, we must apply the teaching of *National Woodwork* and *Pipefitters* to the NLRB's decisions.[162]

1. *All the surrounding circumstances*

Did the Board, in characterizing the challenged Rules as work acquisition rather than work preservation clauses, examine "all the surrounding circumstances"?[163] When defining the work in controversy—the first step in determining whether the union was engaged in work preservation or work acqusition[164]—the Board settled on off-

[161] *See* Rule 1(a)(1), (2), *reprinted in* Appendix B *infra.*

[162] *See* text at notes 127-132 *supra* (enumerating points of law from *National Woodwork* and *Pipefitters*).

[163] *National Woodwork Manufacturers Ass'n v. NLRB,* 386 U.S. 612, 644 (1967); *see NLRB v. Enterprise Ass'n of Steam, etc. Pipefitters,* 429 U.S. 507, 524 (1977).

[164] *See International Longshoremen's Ass'n,* 221 N.L.R.B. 956, 959 (1975) ("in order to properly evaluate the validity of ILA's claim to the work, 'it is essential to define with some precision the work in controversy since that is the predicate upon which the issue of work preservation must turn.'" (*quoting* ALJ)).

pier stripping and stuffing of containers.[165] Because longshoremen have always done their work on the piers, the Board reasoned, they could not traditionally have performed the work in controversy.[166] Instead, employees of consolidators and trucking companies with off-pier terminals did the work of stuffing and stripping containers away from the pier.[167] Hence for ILA labor to lay claim to this work amounted to work acquisition rather than to preservation of traditional ILA work.[168]

This formulation of the work in controversy, however, could not reasonably have been based on "all the surrounding circumstances" as required by *National Woodwork* and *Pipefitters.*[169] When a technological innovation is introduced in the workplace, new work may be created and may initially be performed, as in these cases, by employees other than those who worked with the old technology. The crucial question is how best to rationalize the work that results from the innovation into traditional work patterns. As a rule, this cannot be done by ignoring those traditional work patterns when defining the work in controversy. But that is precisely what the NLRB has done here. Rather than define a category of work based on work patterns both prior and subsequent to the innovation, the Board has defined the work in controversy specifically in terms of the innovation, thus *by definition*

[165] *See* 231 N.L.R.B. at 352, 365 (off-pier stripping of FSL containers within 50 miles of port); 98 L.R.R.M. at 1277 ("traditionally the off-pier stuffing and stripping of containers was performed by consolidating companies and not longshoremen").

[166] 231 N.L.R.B. at 365; 98 L.R.R.M. at 1277.

[167] 231 N.L.R.B. at 365; 98 L.R.R.M. at 1277.

[168] 231 N.L.R.B. at 365; 98 L.R.R.M. at 1277.

[169] 429 U.S. at 524; 386 U.S. at 644.

removing any opportunity for pre-innovation workers to preserve their work. Under such a formulation the Supreme Court's work preservation doctrine is sapped of all life.[170]

There may be cases, of course, in which work engendered by the technological innovation is so different in character from the traditional work that claims based on that traditional work can rightly be discounted, even ignored. But we are not presented with such a case here. The overriding similarities between the traditional work of longshoremen and the work of stuffing and stripping containers are evident.[171] Longshoremen have historically

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[170] The Board's definition of the work in controversy in the instant cases stands in vivid contrast to its definition in *Pipefitters*. In the latter case the NLRB held that the provision at issue was a valid work preservation clause, 204 N.L.R.B. at 760, because the "clause was for the purpose of preserving work [that the pipefitters] had traditionally performed." *Id.* That traditional work was the cutting and threading of pipes, a category that, unlike the one chosen in the present cases, takes into account work patterns both prior and subsequent to the innovation. This definition of the work in controversy in *Pipefitters* was not upset by the Supreme Court. 429 U.S. at 521 n.8. Rather, the Court focused primarily on the Board's application of the right to control test. As put by the Court, "The question now before us is whether a union seeking the kind of work traditionally performed by its members at a construction site violates § 8(b)(4)(B) when it induces its members to engage in a work stoppage against an employer who does not have control over the assignment of the work sought by the union." *Id.* at 510-511. The right to control test is discussed in the context of the instant cases in text at notes 187-192 *infra*.

[171] Note the expansive language used by the NLRB when it originally certified the longshore unit in the Port of New York:

> All longshore employees engaged *in work pertaining to the* rigging of ships, coaling of same, *loading and unload-*

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loaded and unloaded ocean-borne cargo, which not only has meant loading the cargo into and out of the hold of the ship, but also has meant sorting the cargo and loading it on to equipment such as pallets.[172] From the longshoremen's standpoint, therefore, containerization merely represents a change in equipment.[173]

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> *ing of cargoes,* including mail, ships' stores and baggage, handling lines in connection with the docking and undocking of ships, including hatch bosses; cargo repairmen, checkers, clerks and time keepers and their assistants, including head receiving and delivery clerks; general maintenance, mechanical and miscellaneous workers; horse and cattle fitters, grain ceilers, and marine carpenters in the Port of Greater New York and vicinity * * *.

New York Shipping Ass'n, Inc., 116 N.L.R.B. 1183, 1188 (1956) (emphasis added; footnote omitted).

[172] *See* text at notes and notes 9, 18 & 43 *supra*.

[173] Although the location of the work has changed as well, in the sense that the stripping and stuffing at controversy here is done off pier, this is not an immutable characteristic of the work; it just as easily could be done on pier. That the NLRB found good reason for containers to be stripped before being trucked—to meet state highway and bridge laws, to better balance the cargo, to use trailer space efficiently (respondent's brief (B-HR) at 8)—is therefore immaterial. The essential stripping need not occur away from the dock. Moreover, the challenged Rules affect only those containers that are to be stripped or stuffed within 50 miles of port; the shift of this work back to the dock is not, therefore, implausible.

It should be noted that use of the new equipment—containers—does not require that ILA labor undergo retraining. But even if it did, this would not perforce mean that efforts to claim work involving the new equipment would be secondary. *See* Note, *Secondary Boycotts and Work Preservation*, 77 YALE L. J. 1401, 1411 (1968) ("[I]f technological change requires employee retraining, nothing in the primary-secondary rationale justifies forbidding the union to claim and preserve jobs." (footnote omitted)).

Further, the very nature of containers belies any notion that they present work distinctly different from and unrelated to traditional longshoremen's work. As Judge Friendly recently observed in another context, "Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds."[174] The Supreme Court, in affirming Judge Friendly's observations, wrote of containerization: "In effect, the operation of loading and unloading has been moved shoreward; the container is a modern substitute for the hold of the vessel."[175] The correspondence between the shift to containerized shipping and the sharp reduction in employment opportunities for longshoremen bears witness to the wisdom of these observations.[176]

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[174] *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 53 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977). This case held that the Longshoremen's and Harbor Workers' Compensation Act covers employees stuffing and stripping containers away from the ships that carried them.

[175] *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 270 (1977), *aff'g Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35 (2d Cir. 1976).

[176] *See International Longshoremen's Ass'n,* 221 N.L.R.B. 956, 957 (1975) ("As fewer cargo units reached the piers, there was a proportionate decrease in loading and unloading work for the longshoremen represented by [the] ILA."); note 10 *supra* (citing two estimates of productivity increases due to containerization); JA(B-HR) 457a (Gleason testimony) (the number of longshore employees and the number of man-hours they have worked have gone down dramatically in recent years). It is useful in this context to point out that the Supreme Court in *National Woodwork* provided as an example of a "surrounding circumstance" "the threat of displacement by the banned product or services." 386 U.S. at 644 n.38.

. We hold that the NLRB committed reversible legal error by ignoring circumstances crucial to responsible application of the Supreme Court's work preservation doctrine enunciated in *National Woodwork* and *Pipefitters.* If the NLRB cannot, as it has not in these cases, establish that the new work is sufficiently unrelated to the old work to present a clear break with the past, it must not ignore traditional work patterns when defining the work in controversy. In this case proper consideration of the relevant work patterns both prior and subsequent to the advent of containerization might have led to a different categorization for the work in controversy. The loading and unloading of ocean-borne cargo, with its directly related peripheral tasks such as sorting cargo, is an example of one possible categorization.[177] It is the province of the NLRB to settle upon the correct categorization, of course, and we offer no opinion on the proper one. We simply hold that the Board erred as a matter of law by ignoring traditional work patterns when defining the work in controversy.[178]

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[177] It is not difficult to imagine a party unhappy with this court's decision today subjecting that decision to the following exercise in *reductio ad absurdum*: Under the court's ruling, cannot longshoremen literally chase containers around the country, demanding the right to stuff and strip them? There is a short answer: No. Our decision does not radiate beyond the Rules on Containers, which are restricted in terms to a 50-mile area around each port.

[178] In *Conex* the Board argued that the ILA had abandoned any right to the work in controversy due both to its 1959 agreement with the NYSA, *see* text at notes 46-48 *supra,* and to the period of time between the advent of containerization and attempts by the ILA, through the Rules, to secure the work. Even though the Second Circuit affirmed the Board, it disavowed this point's' validity. 537 F.2d at 712.

The Board apparently does not rely on this abandonment

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2. *Whose labor relations?*

National Woodwork instructed us, and *Pipefitters* re-instructed us, that to be classified as work preservation a boycott must be focused on the "labor relations of the

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point in the instant cases, but Chairman Fanning used the point to justify the fact that he dissented in the Baltimore-Hampton Roads case and concurred in the New York case. In our view the abandonment point is without merit. We break no new ground when we characterize collective bargaining as "a constant and unending dialogue of powers." O. KAHN-FREUND, LABOUR AND THE LAW 15 (2d ed. 1977). As in any dialogue, the most appropriate response cannot always be framed instantaneously. Rather, ideas generally develop over time; the best ideas may indeed require the longest gestation periods. Be that as it may, the crucial point here is that the dialogue over how best to assimilate containerization—and, more particularly, the work of stuffing and stripping containers in the port area—into traditional longshore work patterns has never ceased. As Part I of this opinion demonstrates, the issue of containerization has been a key ingredient in ILA-shipper relations from the moment of its inception to the present.

Further, the abandonment point ignores the possibility of recapturing work that, due to technological innovation or managerial initiative, has temporarily escaped from the bargaining unit. *Compare* Note, *Work Recapture Agreements and Secondary Boycotts,* 90 HARV. L. REV. 815 (1977) (arguing for an intermediate category of "work recapture" between the categories of "work preservation" and "work acquisition"), *with Meat & Highway Drivers, Dockmen, etc., Local 710 v. NLRB,* 335 F.2d 709, 714 (D.C. Cir. 1964) ("Moreover, in the case before us, we have not work acquisition but work recapture.").

A variation on the abandonment theme is offered by intervenor Houff Transfer, Inc. in the Baltimore and Hampton Roads case. Houff argues that the negotiation of the royalty payment provision in the Rules represents a conscious choice on the part of the ILA to accept that payment instead of the work of stuffing and stripping FSL containers. Intervenor's

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contracting employer *vis-à-vis* his own employees."[179] The boycott must not be "tactically calculated to satisfy union objectives elsewhere."[180]

Ever since containerized shipping was first introduced in New York, Baltimore, and Hampton Roads, it has been a hotly debated item between shippers and their associations (CONASA, NYSA, STAB, HRSA, etc.), on the one hand, and the ILA on the other.[181] Indeed, containerization bears primary responsibility for months of work stoppages by ILA members infuriated by actions of shippers with respect to containerization.[182] The Rules on Containers and activities seeking to enforce the Rules are directly traceable to the collective bargaining relationship between the shippers and the ILA and to the efforts of the parties, within the confines of that relationship, to adjust to an extremely thorny industrial issue: technological innovation versus job security. Nowhere has it been established, or even intimated, that the ILA, perhaps with a view to organization, was attempting to focus

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brief at 26 *et seq.* The argument is plausible only to the extent that abandonment took place with respect to FSL containers that go directly to their beneficial owners or to a point outside a 50-mile radius of the ports for stripping. The ILA has consistently proven antagonistic to the idea that any containers can be stripped or stuffed in the port area by other than ILA labor. This hardly amounts to abandonment, the royalty payment notwithstanding. For a case where abandonment may have taken place, *see International Longshoremen's & Warehousemen's Union,* 208 N.L.R.B. 994 (1974), *aff'd (mem.),* 515 F.2d 1018 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 942 (1976).

[179] 386 U.S. at 645; *see* 429 U.S. at 511, 528.

[180] 386 U.S. at 644; *see* 429 U.S. at 511, 528.

[181] *See* Part I *supra.*

[182] *Id.*

its boycott on the labor relations of the trucking companies and the consolidators.[183] Those employers were affected by the boycott, to be sure, as were their employees. But we must distinguish between the incidental effects of primary activity, on the one hand, and a secondary purpose on the other. The former are allowable under the national labor laws,[184] and there has been no convincing showing by the NLRB that the latter exists. The challenged boycott unquestionably focused on the "labor relations of the contracting employer *vis-á-vis* his own employees."[185]

3. *The effect of the Rules on the legality of union activity*

Under *Pipefitters* a work preservation agreement does not itself immunize secondary activity from the effects of the congressional proscription of secondary boycotts.[186] Neither the NLRB nor this court relies on this thesis, hence this issue is not raised.

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[183] Thus the First Circuit's observation to this effect in *International Longshoremen's Ass'n v. NLRB*, 560 F.2d 439, 445 (1st Cir. 1977), is inapposite here.

[184] *National Woodwork Manufacturers Ass'n v. NLRB*, 386 U.S. 612, 627 (1967) ("however severe the impact of primary activity on neutral employers, it was not thereby transformed into activity with a secondary objective"). Courts of Appeals have consistently followed the rule that a valid work preservation clause does not become illegal because it has serious impact upon third parties. *See, e.g., Local 742, United Brhd of Carpenters v. NLRB*, 444 F.2d 895, 901 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971); *American Boiler Manufacturers Ass'n v. NLRB*, 404 F.2d 547, 552 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970); *NLRB v. Local 28, Sheet Metal Wkrs International Ass'n*, 380 F.2d 827, 830 (2d Cir. 1967).

[185] 386 U.S. at 645.

[186] 429 U.S. at 514-521.

4. *The right to control test*

In *Pipefitters* the Supreme Court resolved a dispute among the circuits by affirming the validity of the Board's right to control test as a means of delineating primary activity.[187] Under this test an employer subjected to an industrial sanction by his employees must be able to control the disposition of the work sought by those employees for their activity to be considered primary.[188] The Court held that this test was an acceptable gloss on the congressional proscription of secondary boycotts.[189]

Ironically, after defending use of this test in circuit after circuit and finally vindicating its use in the highest court in the land, the NLRB's posture in the cases before us is not supported by rational application of the right to control test. CONASA and NYSA shippers—the employers of the boycotting ILA members in these cases, and the coerced employers under *Pipefitters*—controlled the disposition of all the containers at issue.[190] Indeed,

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[187] Four circuits had rejected the right to control test as a departure from *National Woodwork's* instruction to consider "all the surrounding circumstances." 386 U.S. at 644. *See Local 636, United Ass'n of Journeymen v. NLRB*, 430 F.2d 906 (D.C. Cir. 1970); *Beacon Castle Square Building Corp. v. NLRB*, 406 F.2d 188 (4th Cir. 1969) (dictum); *American Boiler Manufacturers Ass'n v. NLRB*, 404 F.2d 556 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970); *NLRB v. Local 164, International Brhd of Electrical Wkrs*, 388 F.2d 105 (3d Cir. 1968). The Fourth and Ninth Circuits accepted the test's validity. *Associated General Contractors, Inc. v. NLRB*, 514 F.2d 433 (9th Cir. 1975); *George Koch Sons, Inc. v. NLRB*, 490 F.2d 323 (4th Cir. 1973).

[188] 429 U.S. at 521.

[189] *Id.* at 514-521.

[190] The Board notes that the Equipment Interchange Agreement used by United States Lines granted truckers "control"

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according to the Board the Rules reach no containers except those owned or leased by the shippers.[191] Thus when the relevant Container Committees found the shippers in violation of the Rules and fined them, the shippers, after unsuccessfully seeking indemnification from the truckers and consolidators, simply refused to supply their containers to the truckers and consolidators so that the Rules would be complied with—that is, so that ILA labor would do the work if the work were to be done. It is difficult to imagine a more forceful demonstration of control.[192]

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over containers in their "custody and possession." 231 N.L.R.B. at 361, 365. As these cases amply demonstrate, however, and as the NLRB itself recognizes, 231 N.L.R.B. at 362-363; 98 L.R.R.M. at 1277, the shipper's power of disposal over the containers is not thereby impaired, as the shipper can simply refuse to release a container to a trucking company or consolidator. We also find this point dispositive of the Board's contentions with respect to the right of consolidators and trucking companies to control the cargo inside the containers. Unless the shippers turn over the containers, as they ultimately chose not to do in the cases before us, this "right" is without substance.

[191] 98 L.R.R.M. at 1277 ("Briefly, these Rules require that *any containers owned or leased* by employer-members [of CONASA] * * *." (emphasis added)). *See* JA(B-HR) 415a. This observation of the NLRB appears to be in conflict both with the terms of the 1974 Rules, *see* Rule 1(a)(1), *reprinted in* Appendix B *infra*, and with its earlier determination in *Conex*, *see* 221 N.L.R.B. at 960. Containers "used" by CONASA shippers also come under the Rules. The important points here, however, are that petitioners' contentions that the shippers owned or leased the containers at issue are unrefuted and that, in any event, the shippers clearly had "control" over the disposition of the containers.

[192] Thus, in light both of our preceding discussion on the proper formulation of the work in controversy, *see* text at

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5. *The substantial evidence standard*

The *Pipefitters* Court made abundantly clear that, under the NLRA,[193] courts reviewing NLRB decisions are bound by the Board's factual findings if supported by substantial evidence on the record considered as a whole.[194] But the salient facts underlying the cases before us are not in dispute. This is the fourth circuit to adjudge the validity of the Rules on Containers or of action seeking to enforce the Rules, and the factual backgrounds of these cases overlap to a significant degree.[195] As the NLRB forthrightly observed with respect to the instant case arising in Baltimore and Hampton Roads, "[P]etitioners' real complaint is with the Board's analytic framework not its findings of fact,"[196] a characterization in which the petitioners heartily concur.[197] And as to the New York case, the Board commented that its

> decision in Conex is controlling. The Conex case

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notes 163-178 *supra*, and of the shippers' control over disposition of containers, the Supreme Court's following characterization in *Pipefitters* is inapplicable to the instant cases: "the union sought to acquire work that it never had and that its employer had no power to give it * * *." 429 U.S. at 530 n.16

[193] 29 U.S.C. § 160(e) (1976).

[194] 429 U.S. at 530-531.

[195] *See* text at notes 133-159 *supra*. Also, the District Court's decision in *Consolidated Express, Inc. v. New York Shipping Ass'n*, 452 F.Supp. 1024 (D. N.J. 1977), has been the subject of an interlocutory appeal to the Third Circuit, —— F.2d —— (3d Cir. Nos. 78-1529 & 78-1530, decided April 16, 1979), *aff'g in part & rev'g in part* 452 F.Supp. 1024.

[196] Respondent's brief (B-HR) at 34 n.20.

[197] *See, e.g.*, petitioner's (CONASA) reply brief (B-HR) at 2.

> involved the identical Respondents [NYSA and ILA] and dealt with the same Rules on Containers. The charging parties in Conex were also consolidating companies engaged in off-pier stripping and stuffing of containers. * * *[198]

In *Conex* Judge Wyzanski, who wrote the majority opinion affirming the NLRB, stated that "[t]here is no dispute as to the objective facts in this case."[199]

Like the petitioners and the other circuits, this court has no dispute with the Board's factual findings. Rather, our conflict with the NLRB is exclusively focused on the Board's misinterpretation and misapplication of the prevailing law—the doctrine of work preservation.[200] The Supreme Court has consistently maintained that NLRB rulings should not be sustained by reviewing courts where those rulings rest on "erroneous legal foundations."[201] The NLRB's decisions before us are of such a character, and thus reversal is warranted.[202]

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[198] 98 L.R.R.M. at 1277.

[199] 537 F.2d at 708.

[200] *See* text at notes 105-132 *supra.*

[201] *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956); *see NLRB v. Brown*, 380 U.S. 278, 290-292 (1965).

[202] In Nos. 77-1735 and 77-1758 intervenor Houff Transfer, Inc. maintains that, because these cases focus on FSL containers while *Conex* (and No. 78-1510) focuses on CFCL, LTL, and LCL containers, the respective factual backgrounds are distinguishable. Intervenor's brief at 37-40. However, because we find that the Board committed an error of law in both the New York and the Baltimore-Hampton Roads cases, Houff's argument is not relevant.

III. Conclusion: Containerization and the National Labor Policy

The relationship between the ILA and CONASA shippers has been under continual strain over the past two decades due to containerization.[203] Their relationship has survived prolonged negotiations, presidential intervention, and the occasional use of economic force.[204] The result of their efforts is the Rules on Containers. These Rules represent a reasoned response to the difficult problem of technological innovation and are an exemplar of the self-government contemplated by Congress when it left the bulk of industrial problems to be resolved in the private sector.[205] The Rules seek neither to stymie technological innovation nor to introduce manual labor in situations where the work otherwise would be handled by more effi-

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[203] *See* Part I *supra.*

[204] *Id.* It hardly requires mention that use of economic force in collective bargaining is fully within the contemplation of the national labor laws. In *NLRB v. Insurance Agents International Union*, 361 U.S. 477, 489 (1960), the Supreme Court stated, "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." *See NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272, 287 (1972) ("Preventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal. When a bargaining impasse is reached, strikes and lockouts may occur."); *Air Line Pilots Ass'n International v. CAB*, 502 F.2d 453, 456 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) (national labor policy rests upon the principle that parties are free to marshal economic resources in resolution of labor disputes, consistent with the rights and prohibitions of labor statutes).

[205] *See generally* Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999 (1955).

cient mechanized means;[206] rather, the Rules intend to secure for ILA labor any stripping and stuffing of containers that is to be performed within 50 miles of port by other than the employees of the cargo's beneficial owner. Courts and the NLRB must take great care not to disturb the parties' reasoned attempts at self-governance unless those attempts contravene the law. For the reasons stated in this opinion, we believe that the NLRB has failed to demonstrate that the Rules on Containers and action seeking to enforce the Rules are in contravention of the law. Accordingly, the NLRB's decisions in these cases are vacated, and its cross-applications for enforcement are denied. We remand to the NLRB for any further proceedings it deems appropriate.

So ordered.

APPENDIX A

1968 Hampton Roads Rules on Containers

I. CONTAINERIZATION

Containers owned or leased by Employer-signatory members (including containers on wheels) containing

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[206] Containers that were not stuffed and stripped in compliance with the Rules, however, have been, and doubtless in the future will be, subjected to duplicate stuffing and stripping by ILA labor. Consider one commentator's characterization of ILA behavior that in the past has slowed the rate of innovation:

> There is reason to believe, or at the very least the question must remain open, that the optimum rate in which labor-saving technology is introduced is not the fastest possible rate. To the extent that this is true, union impediments may be considered as not merely obstacles to progress, but as efforts to buy time in which the human costs of change can be softened and made more tolerable.

Ross. *supra* note 7, 21 LAB. L. J. at 419.

LTL loads or consolidated full-container loads, which are destined for or come from, any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50-mile radius from the center of any North Atlantic District port shall be stuffed and stripped by ILA longshore labor at longshore rates on a waterfront facility under the terms and conditions of the General Cargo Agreement. (Rules on Containers are listed below.)

II. RULES ON CONTAINERS

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts at deepsea piers or terminals. To assure compliance with the collective bargaining provisions the following rules and regulations shall be applied.

A. Definitions and Rule as to Containers Covered

Stuffing—means the act of placing cargo into a container

Stripping—means the act of removing cargo from a container

Loading—means the act of placing containers aboard a vessel

Discharging—means the act of removing containers from a vessel.

These provisions relate solely to containers meeting each and all of the following criteria:

1. Containers owned or leased by employer-signatory

members (including containers on wheels) which contain LTL loads or consolidated full container loads.

2. Such containers which come from or go to any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

3. Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle within its radius extending out from the center of each port. It is understood that the center of Hampton Roads will be defined as Middle Ground Light.

B. Rule of Stripping and Stuffing Applied to Such Containers

A container which comes within each and all of the criteria set forth in "A" above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping shall be performed on a waterfront facility, pier or dock. No container of cargo shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or consolidated container loads of mail, of household goods with no other type of cargo in the container, and of personal effects of military personnel shall be exempt from the rule of stripping and stuffing.

C. Rules on No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply.

1. Agreement in the Port as to the geographic area as provided in "A (3)" is based on present LTL movement patterns in the port. Should any person, firm or corporation, for the purpose of evading the provisions of "B" hereof, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside agreed-upon geographic area, then either party may raise the question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of "B", then said point shall be deemed to be within the said geographic area for the purpose of these rules.

2. Containers owned or leased by companies which are affiliated either directly or through a holding company with an employer-member shall be deemed to be containers owned or leased by employer-members. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the employer-member, its parent, or stockholders of either of them.

3. It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is an "A" container which is to be stuffed and stripped at the waterfront facility (pier or dock).

4. Each employer-member shall keep records of each container supplied to a consolidator or other non-owner of cargo, located within the agreed geographic area, and such record shall be available to the Committee provided

in (7) below. With respect to all containers received at or delivered from the vessel, a record of the same shall be made by ILA Checkers or Clerks.

5. Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of "B" shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules then the steamship carrier found guilty of intent to cause improper, fictitious, or incorrect documentation to evade the provisions of "B" above shall pay to the joint Welfare Fund $150.00 per container which should have been stuffed or stripped.

6. If any shippers or their agents who have at any time used, are now using, or in the future use containers owned or leased by employer-members, hereafter use containers not owned or leased by employer-members, for the purpose of evading the provisions of "B" hereof, then the containers so used shall be considered to be within "A" and "B".

7. A committee represented equally by management and Union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by "C (8)" hereof.

8. If the purpose of protecting and preserving the present work jurisdiction of longshoremen and all other deepsea ILA crafts over any containers loaded with LTL

cargo, or consolidated full container loads as defined herein is not accomplished by the provisions of these rules on containers, then either party shall have the right to renegotiate these provisions or any part thereof by giving notice to the other party. This provision shall not be subject to arbitration. Pending renegotiation and settlement of the given dispute, the employees may decline to work the specific containers involved in the dispute and such refusal to work shall not be subject to arbitration. The renegotiation referred to above will not be subject to arbitration. Interpretation of this provision shall not be determined by an arbitrator but by a court of competent jurisdiction.

APPENDIX B

1974 Rules on Containers

CONASA-ILA RULES ON CONTAINERS

PREAMBLE

This Agreement made and entered into by and between the carrier and direct employer members of the CONASA Port Associations (hereinafter referred to collectively as "CONASA") and the International Longshoremen's Association, AFL-CIO ("ILA"), its Atlantic Coast District ("ACD") and its affiliated local unions in each CONASA port ("locals") covers all container work at a waterfront facility which includes but is not limited to the receiving and delivery of cargo, the loading and discharging of said cargo into and out of containers, the maintenance of containers, and the loading and discharging of containers on and off ships.

CONASA agrees that it will not directly perform work done on a container waterfront facility (as hereinafter defined) or contract out such work which historically and regularly has been & currently is performed by employees covered by CONASA-ILA Agreements, including CONASA-ILA craft agreements, unless such work on such container waterfront facility is performed by employees covered by CONASA-ILA Agreements.

RULES

The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts which was performed at deepsea waterfront facilities. These rules do not have any effect on work which historically was not performed at a waterfront facility by deepsea ILA labor. To assure compliance

with the collective bargaining provisions, the following rules and regulations shall be applied uniformly in all CONASA Ports to all import or export cargo in containers:

Definitions

(a) Loading a Container—means the act of placing cargo into a container.

(b) Discharging a Container—means the act of removing cargo from a container.

(c) Loading Containers on a vessel—means the act of placing containers aboard a vessel.

(d) Discharging Containers from a vessel—means the act of removing containers from a vessel.

(e) Waterfront facility—means a pier or dock where vessels are normally worked including a container compound operated by a carrier or direct employer.

(f) Qualified Shipper—means the manufacturer or seller having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export cargo being transported and who is named in the dock/cargo receipt.

(g) Qualified Consignee—Means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.

(h) Consolidated Container Load—means a container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

Rule 1—Containers To Be Loaded or Discharged by Deepsea ILA Labor

(a) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by deepsea ILA labor:

(1) Containers owned, leased or used by carriers (including containers on wheels and trailers), hereinafter "containers", which contain consolidated container loads, which come from or go to any point within a geographic area of any CONASA port described by a 50-mile circle with its radius extending out from the center of each port. (hereinafter "geographic area") or

(2) Containers which come from a single shipper which is not the manufacturer ("manufacturer's label") into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the "geographic area," or

(3) Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the "geographic area" and which is not warehoused in accordance with Rule 2(B).

(b) Such ILA labor shall be paid and employed at deep-sea longshore rates under the terms and conditions of the deep-sea ILA labor agreement in each CONASA port, including the provisions for all fringe benefits and any and all other benefits receivable by deep-sea ILA craft workers in each such Port. No cargo shall be loaded into or discharged out of any container by ILA deep-sea labor more than once.

(c) All export consolidated cargo, described in 1(a) (1) and (2) above, shall be received at the waterfront facility by deep-sea ILA labor and such cargo shall be loaded into a container at the waterfront facility for loading aboard ship.

(d) All import consolidated cargo, described in 1(a) (1) and (3) above, shall be discharged from the container and the cargo placed on the waterfront facility where it will be delivered and picked up by each consignee.

(e) No carrier or direct employee shall supply its containers to any consolidator or de-consolidator. No carrier or direct employer shall operate a facility in violation of the Rules on Containers which specifically require that all Rule 1 Containers be loaded or discharged at a waterfront facility.

Rule 2—Containers Not to be Loaded or Discharged by ILA Labor

Cargo in containers referred to below shall not be loaded or discharged by ILA labor:

A. Export Cargo:

(1) All cargo loaded in containers outside the "geographic area".

(2) Containers loaded with cargo at a qualified shipper's facility with its own employees.

(3) Containers loaded with the cargo of a single manufacturer (manufacturer's label).

(4) Consolidated container loads of mail, household effects of a person who is relocating his place of resi-

dence, with no other type of cargo in the container, or personal effects of military personnel.

B. Import Cargo;

(1) All cargo discharged from containers outside the "geographic area".

(2) Containers discharged at a qualified consignee's facility by its own employees.

(3) Consolidated container loads of mail, household effects of a person who is relocating his place of business, with no other type of cargo in the container, or personal effects of military personnel.

(4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions.

1. The container cargo is warehoused at a bona fide public warehouse.

2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days, and;

3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.

The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused

as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or de-consolidator.

Rule 3—Batching

When an employer-member or carrier uses a trucker to remove or deliver containers in batches, or in substantial number, from or to a terminal to another place of rest (outside of its terminal) where containers are stored pending their delivery to a consignee (or after being received from a shipper and while waiting the arrival of a ship), for the purpose of reducing the work jurisdiction of the ILA or any of its crafts, such use is deemed to be batching and an evasion of these Rules in violation of the CONASA-ILA contract.

Rule 4—Headload

Where a single qualified shipper sends an export container which contains all of his own cargo to a waterfront facility and such container is not full, the carrier or direct employer may load this container with additional cargo at the waterfront facility. On import cargo, the carrier or direct employer may discharge any such additional cargo and send the remaining cargo in the container to the qualified consignee. The loading or discharging of cargo at ILA ports shall be performed at a waterfront facility by deepsea ILA labor.

Rule 5—Overland Movement of Containers from CONASA Port to Non-CONASA Port

If a carrier moves containers from a CONASA Port to a non-CONASA Port for the purpose of evading the Rules on Containers, the carrier is in violation of the CONASA-ILA Agreement. If the cargo is being moved to a non-

CONASA-ILA Port in the normal course of business, and not for the purpose of evasion, then such movement is not a violation.

Rule 6—Importers Advertising Evasion of Rules

The circulation, in writing, by importers, of methods developed by them to evade the Rules on Containers by issuing single bills of lading on what are in fact consolidated container loads shall be deemed a violation and all CONASA-ILA Container Committees shall be advised to stop such evasion at the waterfront facilities.

Rule 7—No Avoidance or Evasion

The above rules are intended to be fairly and reasonably applied by the parties. To obtain non-discriminatory and fair implementation of the above, the following principles shall apply:

(a) Geographic Area—Agreement in the Port to the geographic area as provided in Rule 1 is based on present consolidated movement patterns in the port. Should any person, firm or corporation for the purpose of evading the provisions of the Rules on Containers, seek to change such pattern by shifting its operations to, or commencing new operations at, a point outside said agreed upon geographic area, then either party may raise the question whether said point should be included within the said geographic area, and upon agreement that the purpose of the shift in its operations was to evade the provisions of the Rules on Containers, then said point shall be deemed to be within the said geographic area for the purpose of these rules.

(b) Containers Owned, Leased or Used
Containers owned, leased or used by companies which are affiliated either directly or through a holding company with a carrier or a direct employer shall be deemed to be containers owned, leased or used by a carrier or direct employer. Affiliation shall include subsidiaries and/or affiliates which are effectively controlled by the carrier or direct employer, its parent, or stockholders of either of them.

(c) Liquidated Damages—Failure to load or discharge a container as required under these rules will be considered a violation of the contract between the parties. Use of improper, fictitious or incorrect documentation to evade the provisions of Rule 1 and Rule 2 shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been loaded or discharged under the Rules, then the carrier or its agent or direct employer shall pay, to the joint Container Royalty Fund, liquidated damages of $1,000 per container which should have been loaded or discharged. If any carrier does not pay liquidated damages within 30 days after exhausting its right to appeal the imposition of liquidated damages to the Committe provided in Rule 9(a) below, the ILA shall have the right to stop working such carrier's containers until such damages are paid.

(d) Any facility operated in violation of the Container Rules will not have service supplied to it by any direct employer and the ILA will not supply labor to such facility.

Rule 8—Renegotiation and Cancellation—No Arbitration

These Rules shall be in effect for the term of the

CONASA-ILA Agreement, provided, however, that either party shall have the right to cancel the Rules on Containers at any time on or after December 1, 1974, on thirty (30) days written notice of a desire to renegotiate the provisions of these Rules. Negotiations shall be held during such thirty (30) day period and if the parties are unable to agree by the end of such period, these Rules shall be deemed cancelled. Thereafter, the ILA shall have the right to refuse to handle containers and CONASA shall have the right to refuse to hire employees under the said Rules. The negotiations referred to above shall, under no condition, be subject to the grievance or arbitration provisions of any CONASA-ILA Agreement.

Rule 9—Enforcement of the Rules on Containers

To assure effective, fair and non-discriminatory enforcement of the above Rules, the following regulations shall apply:

(a) A Committee in each CONASA port represented equally by management and union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these Rules. Any inability to agree shall be processed as a grievance under the applicable contract except as limited by Rule 8 hereof. A joint committee, known as the CONASA-ILA Container Committee, represented equally by management and labor and made up of representatives (to be mutually agreed upon) from each CONASA Port, namely, Boston, Rhode Island, New York, Philadelphia, Baltimore and Hampton Roads shall meet at least quarterly each year for the purpose of insuring uniformity in the interpretation of these Rules.

(b) A Committee of carriers, together with CONASA-ILA Container Committee will develop uniform documentation which shall be required to be prepared and maintained by all carriers in order to readily identify all Rule 1 containers which are subject to loading or discharging by deepsea ILA labor. It shall be the obligation of employer-members to clearly mark each container's documentation as to whether or not it is a Rule 1 container, which shall be loaded or discharged. If a container's documentation is not clearly marked, it shall be deemed a Rule 1 container and it shall be loaded or discharged by deepsea ILA labor at the waterfront facility. With respect to all containers received at or delivered from the waterfront facility, a record of the same shall be made by ILA Checkers or Clerks. All carriers will distribute to all other carriers any and all information and devices which are being used by any person to circumvent the Rules on Containers. Any carrier whose attention is brought to a violation of the Rules shall immediately cease such violation and report the matter to the appropriate CONASA-ILA Container Committee and to the policing agency provided in (e) below in its port.

(c) Every import container destined to a point within 50-miles of a CONASA Port shall be delivered only on a delivery order. Every export container coming from a point within 50-miles of a CONASA Port shall be received only on a dock/cargo receipt. Such delivery orders and dock/cargo receipts shall certify the place of delivery and origin of the container, the name or names of the person to whom the cargo is being delivered and from which it is shipped, the identity of the owner of the cargo,

weight of the cargo, identity of the cargo and the origin and final destination of the container. Copies of such delivery orders and dock/cargo receipts shall be available to the local port Container Committee and the policing agency provided for in (e) below.

(d) The Container Committee in each CONASA Port shall promulgate to all carriers and direct employers, and to the Container Committees in each CONASA Port, any and all interpretations of the Rules on Containers as and when they are made. This will include uniform interpretations as and when they are issued. The CONASA-ILA Container Committee shall also promulgate uniform interpretations to local port Container Committees, as and when they are issued.

(e) Policing Agency—Each CONASA Port shall establish a method of policing and enforcing these Rules on a uniform and non-discriminatory basis. No such method shall be implemented until presented to and approved by the joint CONASA-ILA Container Committee.

Rule 10—Container Royalty Payments

The two Container Royalty payments required by the CONASA-ILA collective bargaining agreements shall be payable only once in the Continental United States. They shall be paid in that ILA Port where the container is first handled by ILA longshore labor at longshore rates. The second container royalty payment (provided by paragraph 6 of the 1971-1974 CONASA-ILA Memorandum of Agreement) shall be continued and shall be used for fringe benefit purposes only, other than supplemental cash benefits, which purposes are to be determined locally on a port by port basis. Containers originating at a foreign

port which are transshipped at a United States port for ultimate destination to another foreign port ("foreign sea-to-foreign-sea containers") are exempt from the payment of container royalties.

Robb, *Circuit Judge, dissenting:* The keystone of the majority opinion is the assertion that the Board erred by failing to consider "all the surrounding circumstances", and in particular by ignoring "traditional work patterns" of longshoremen. Proper consideration of the "relevant work patterns", says the majority, "would have led to a different categorization for the work in controversy." I do not agree. In my judgment the Board gave proper consideration to the surrounding circumstances, including the traditional work patterns of longshoremen; and I think the Board reached the right result.

In the Baltimore—Hampton Roads case, 231 N.L.R.B. 351 (1972) the Board affirmed the finding of the Administrative Law Judge that

> [T]he history of the longshoremen's work tradition in Baltimore and Hampton Roads show that their role in handling break-bulk import cargo ended at the head of the pier, where an ILA freight handler picked up the cargo and loaded it onto a truck. Thereafter, the fate of that cargo was the responsibility of the motor carrier, as set forth in the bill of lading.
>
> The advent of containerization in the ports of Baltimore and Hampton Roads did not change the traditional role of the ILA longshoremen. The motor carriers have treated import shippers' loads destined for consignees located more than 50 miles from the center of the port of entry much as they did break-bulk cargo. For, with very rare exceptions,

> motor carriers have freely picked up the steamship company's containers mounted on wheeled trailers and hauled them to the consignee in accordance with the bills of lading. The motor carriers have also traditionally hauled such containers to their own truck terminals and have stripped the shippers' loads from them and are loaded into their own trailers, using truck terminal employees, whenever considerations of state regulation, safety, or economy persuaded a motor carrier to take that precaution.

Id. at 365.

In the New York case the Board held that "traditionally the off-pier stuffing and stripping of containers was performed by consolidating companies and not longshoremen. Since the work was not traditional longshore work and had never been performed by longshoremen, the Rules which require the shipping companies to stop doing business with consolidators did not have a lawful work-preservation object." (J.A. 66a) The Board referred to *International Longshoremen's Ass'n, (Conex)* 221 N.L.R.B. 956 (1975), *enf'd* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041, *rehear. denied,* 430 U.S. 911 (1977). In the *Conex* case, which the Board in our case held was controlling, the Board found:

> The traditional work for the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the piers.
>
> Similarly, for many years, maritime cargo has been sorted and consolidated off the docks by companies employing teamsters and unrepresented employees. With the advent of vessels designed exclusively to carry the large containers presently in

> use, these consolidating companies, such as Consolidated and Twin, have continued to consolidate shipments into containers prior to their placement aboard the vessels. The consolidators generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship. Furthermore, they perform this consolidation work at their own off-pier premises, with their own employees who are outside the unit represented by ILA, and who fall within the coverage of separate collective-bargaining agreements, under which they are represented by other labor organizations. It is clear, therefore, that Consolidated and Twin have traditionally been engaged in the work of stuffing and stripping containers such as are here in controversy.
>
> From the foregoing and the record as a whole, it is clear that the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their own off-pier premises. It does not fall within ILA's traditional role to engage in make-work measures by insisting upon stripping and stuffing cargo merely because that cargo was originally containerized by nonunit personnel. Yet, ILA's demands here could only be met if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA.

Id. at 959-60. [Footnote omitted]

There is substantial evidence in the records of both the Baltimore—Hampton Roads case and the New York case to support the Board's finding that the traditional

work of longshoremen does not include the work traditionally performed by motor carriers in stripping and stuffing containers. As the Board said the traditional work of longshoremen has been to load and unload ships, and there is substantial evidence that traditionally longshoremen have not stuffed and stripped containers on the pier or elsewhere. Any stuffing or stripping by longshoremen has been only incidental.

I am not impressed by the fiction that a container is part of the hold of a ship; if it is, then so is any large box in the hold of a ship. Nor am I persuaded by the "similarities" which the majority perceive between the work of loading and unloading ships and the work of filling and emptying containers. The question is not whether there may be similarities in the work entailed in the two operations. Rather, the question is, who traditionally has done that work.

In my opinion the longshoremen are attempting to acquire work they have never had, therefore the defense of work preservation must be rejected. My conclusion is fortified by the decisions of three circuit courts of appeals. *International Longshoremen's Ass'n v. NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041, *rehear. denied,* 430 U.S. 911 (1977); *International Longshoremen's Ass'n Local 1575 v. NLRB,* 560 F.2d 439 (1st Cir. 1977); *Humphrey v. International Longshoremen's Ass'n,* 548 F.2d 494, 499-500 (4th Cir. 1977); *see International Longshoremen's & Warehousemen's Union Local 13,* 208 N.L.R.B. 994 (1974), which this court enforced *per curiam* without an opinion, 169 U.S. App. D.C. 300, 515 F.2d 1017 (1975), *cert. denied,* 424 U.S. 942 (1976).

I would deny the petitions for review and enforce the Board's orders.

Appendix B—Decision and Order of the National Labor Relations Board in *Associated Transport.*

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO

Case 5-CC-791

and

ASSOCIATED TRANSPORT, INC.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL

Appendix B—Decision and Order of the National Labor Relations Board in Associated Transport.

LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO; AND HAMPTON ROADS SHIPPING ASSOCIATION

Case 5-CE-48

and

ASSOCIATED TRANSPORT, INC.

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

Party to the Contract

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; ATLANTIC COAST DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 921, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1355, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1429, AFL-CIO

Case 5-CC-792

and

HOUFF TRANSFER, INC.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; ATLANTIC COAST DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 921, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1355, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1429, AFL-CIO

Case 5-CE-49

Appendix B—Decision and Order of the National Labor Relations Board in Associated Transport.

and

HOUFF TRANSFER, INC.

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

Party to the Contract

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1736, AFL-CIO

Case 5-CC-793

and

HOUFF TRANSFER, INC.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL

Appendix B—Decision and Order of the National Labor Relations Board in Associated Transport.

LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1736, AFL-CIO

Case 5-CE-50

and

HOUFF TRANSFER, INC.

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

Party to the Contract

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1736, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1783, AFL-CIO

Case 5-CC-794

Appendix B—Decision and Order of the National Labor Relations Board in Associated Transport.

and

TIDEWATER MOTOR TRUCK ASSOCIATION

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1736, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1783, AFL-CIO; COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS; AND HAMPTON ROADS SHIPPING ASSOCIATION

Case 5-CE-51

and

TIDEWATER MOTOR TRUCK ASSOCIATION

DECISION AND ORDER

On August 19, 1976, Administrative Law Judge Leonard M. Wagman issued the attached Decision in this proceeding. Thereafter, Respondents Council of North Atlantic Shipping Associations, Hampton Roads Shipping Association, and International Longshoremen's Association, AFL-CIO, and its affiliated District Councils and Locals filed exceptions and supporting briefs. The General Counsel

filed an answering brief in support of the Administrative Law Judge's Decision. Charging Party Houff Transfer, Inc., filed cross-exceptions and supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

Upon careful consideration and detailed analysis of the record evidence, the Administrative Law Judge concluded that Respondents violated the Act as alleged. We agree. Notwithstanding our dissenting colleague's incorrect intimation that the Administrative Law Judge decided this case solely on the authority of our decision in *International Longshoremen's Association AFL-CIO (Consolidated Express, Inc.)*, 221 NLRB 956 (1975), without giving due consideration to the so-called "critical dissimilarities" between that earlier case and the instant case, it is clear that the Administrative Law Judge fully developed the facts here to support the violations which he found. Moreover, despite his own lengthy analysis, our dissenting colleague has ultimately failed to overcome the criteria (noted principally at sec. B, par. 6 of the Administrative Law Judge's Decision) that the Administrative Law Judge correctly relied upon in finding the violations in this proceeding.

We further disagree with our dissenting colleague's characteriaztion of trucking industry representatives' testimony as "conceding" that they *knew* the work they were performing was in violation of the container rules. These officials testified only that Respondents and certain shipping personnel deemed these actions to be violations, not that they actually were violations, or that the trucking industry acknowledged them to be such.

We also reject our colleague's reliance on the Dublin agreement as support for his conclusion that Respondent's object here was a work preservation object. The 1973 Dublin agreement, in relevant part, contained provisions dealing with Respondent's jurisdiction over the unloading of full shippers' loads destined for warehouse storage within 50 miles of port. Respondents' members had been doing that work since 1969, but it is not the work at issue here. Rather, as our dissenting colleague himself notes, "the actions of the [Respondents] and shipping companies which we must adjudge [in this proceeding] involve only shippers' loads destined for a beneficial owner more than 50 miles from port, but which were picked up by motor transport carriers and stripped at trucking stations within 50 miles of port." To that end, the Dublin agreement does not aid our colleague's position in any way.

Our dissenting colleague also finds some significance in the fact that in the *Consolidated Express* case, noted above, the charging parties were companies historically engaged in the primary function of loading and unloading, whereas the Charging Parties here are primarily engaged in the transportation of cargo and not its loading or unloading. We view this fact as a distinction without a difference because it is not important what type of enterprise was doing the work; rather, what is important is that Respondents' members here, as in *Consolidated Express*, had *not* historically done the work.

Finally, our colleague makes passing reference to the Supreme Court's recent decision in *Northeast Marine Terminal Company, Inc.* v. *Caputo,* Docket 76-444 (June 17, 1977). We agree with his statement that the context of

that case is "concededly different" from that present here. And to the extent our colleague extracts certain language from that decision which he indicates supports his position, we note that the Supreme Court there expressly adopted certain language from the Second Circuit's decision in *Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 53 (C.A. 2, 1976). It was also the Second Circuit which enforced our decision in *Consolidated Express,* with the words "it is clear that the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work [of stuffing and stripping containers] traditionally performed by Consolidated and Twin at their own off-pier premises." 537 F.2d at 712. Thus, reference to the *Northeast Marine* case when read in conjunction with the *Consolidated Express* decision proves only one thing, that it is the facts of each case in the area which are paramount.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondents International Longshoremen's Association, AFL-CIO; Hampton Roads District Council International Longshoremen's Association, AFL-CIO; ILA Locals 846, 862, 970, 1248, 1458, 1624, 1736, 1738, 1784, 1819, 1840, and 1970, ALF-CIO; Atlantic Coast District Council International Longshoremen's Association, AFL-CIO; and ILA Locals 333, 921, 953, 1355, and 1429, AFL-CIO, their respective officers, agents, and representatives, and Respondents Council of North Atlantic Shipping Associations (CONASA), and Hampton Roads Shipping Association (HRSA), their respective officers, agents, successors, and

assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. August 12, 1977

.....
John A. Penello, Member

.....
Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

CHAIRMAN FANNING, dissenting:

In concluding that Respondents violated Section 8(e) and 8(b)(4)(ii)(B) of the Act, the Administrative Law Judge placed considerable reliance on the Board's determination in *International Longshoremen's Association, AFL-CIO (Consolidated Express, Inc.)*,[1] involving the knotty problem of some facets of containerization in the New York port area. Here, the problem involves another facet of containerization as it developed some 10 years later in the ports of Baltimore and Hampton Roads. While the Administrative Law Judge cites additional factors which I address below, it is his failure to perceive distinctions between the work practices and bargaining agreements negotiated by the ILA and the shipping companies in New York and those involving the ports of Baltimore and Hampton Roads which results in his erroneous legal conclusion. My colleagues, I fear, by affirming the Administrative Law Judge, fail to heed the Supreme Court's warning that assessing whether a contractual provision has a valid work preservation objective "will not always be a simple test to apply."[2] In my view, a more searching inquiry reveals critical dissimilarities between this case and *Consolidated Express.*

At issue here is the limited question of whether Rules 1(a)(3) and 2B(2) of the 1974-77 Rules on Containers (hereinafter 1974 Rules),[3] which entitle International Long-

[1] 221 NLRB 956 (1975), enfd. 537 F.2d 706 (C.A. 2, 1976), cert. denied 97 S.Ct. 740 (1977) (hereinafter *Consolidated Express*).

[2] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 645 (1967).

[3] The Rules' pertinent provisions are as follows:

Rule 1—*Containers to be Loaded or Discharged by Deepsea*

(footnote continued on following page)

shoremen's Association (ILA) labor to strip and stuff shippers' loads[4] whenever the work is to be done within 50 miles of port by other than the consignee's employees, are valid work preservation provisions. In making this determination, careful scrutiny must be given to that history of containerization which is unique to the ports of Baltimore, Maryland, and Hampton Roads, Virginia.

The record discloses that container traffic first appeared in Baltimore harbor and in the Hampton Roads port area in 1965. For decades prior to this time, ILA employees unloaded bulk cargo from steamships on a piece-by-piece basis, sorted it out, and transported the cargo to the end of the pier for loading by them onto the back of a truck.

(footnote continued from preceding page)

ILA Labor.

(a) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by deepsea ILA labor.

(1) Containers owned, leased or used by carriers . . . which contain consolidated container loads, which come from or go to any point within a geographic area of any CONASA port described by a 50-mile circle with its radius extending out from the center of each port (hereinafter "geographic area"), or

• • • • • •

(3) Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employee within the "geographic area" and which is not warehoused in accordance with Rule 2(B).

Rule 2—*Containers Not to be Loaded or Discharged by I.L.A. Labor.*

B. Import Cargo:

• • • • • •

(2) Containers discharged at a qualified consignee's facility by its own employees.

[4] The term "shipper's load" refers to a full container of goods from one shipper to a single beneficial owner-consignee.

Their work therefore covered all movement of ocean cargo from a delivery truck's tailgate to the ship's hold for export cargo, and the converse for import cargo. Between 1965 and 1968, ILA's collective-bargaining agreements covering longshoremen in the ports of Baltimore and Hampton Roads did not contain any rules regarding the extent to which longshoremen were to be used in the handling of containers or their contents. It appears that, during this period, ILA-represented employees stripped (unloaded) import containers which held less-than-trailer-load cargo (LTL) and also consolidated full container loads.[5] Full shippers' loads, however, were placed by ILA labor on the pier, unless unloading was requested by the consignee's agent or the stevedore. A motor transport carrier generally would then drive to the pier and pick up the shipper's load container intact.

With the advent of containerization, the work opportunities associated with bulk cargo on the piers diminished substantially.[6] The adaptation to burgeoning containerization led to a 56-day strike by the ILA in 1963. Following the strike settlement, the ILA entered into a 1968-71 collective-bargaining agreement with Hampton Roads Maritime Association[7] and Steamship Trade Association of Baltimore (STA), setting forth "Rules and Conditions

[5] An LTL load refers to a container which is not full and which contains the cargo of two or more shippers. Consolidated loads contain the goods of two or more shippers and are usually destined for more than one consignee or beneficial owner.

[6] An ILA official testified that, before containerization, 5 gangs of 22 men loaded or unloaded an average of 30 tons per hour. With the new method of loading and unloading ships, a 20-man gang and 1 crane could load 600 tons per hour.

[7] The Hampton Roads Maritime Association was the predecessor to the Hampton Roads Shipping Association (HRSA), a Respondent in this case.

Covering Handling of Containers." It is apparent therefore that these initial Rules on Containers were adopted in Baltimore and Hampton Roads when containerization in those ports was still in its infancy.[8]

Since the introduction of container traffic to the ports of Baltimore and Hampton Roads, the shipping companies and ILA have contractually agreed that ILA-represented employees must load and unload LTL and consolidated full container loads if destined for a point within a 50-mile radius from the center of port. Two subsequent agreements negotiated by the ILA and representatives of the steamship carriers for 1971-74 and 1974-77 have also included provisions authorizing ILA members to perform this work.[9] These contractual provisions and the work practices relative to LTL and consolidated loads, however, are not at issue here.

Our sole concern is with the provisions in the 1974 Rules, which entitle ILA labor to strip shippers' loads whenever such work is to be done less than 50 miles from port. Specifically, the actions of the ILA and shipping companies which we must adjudge involve only shippers' loads destined for a beneficial owner more than 50 miles from port, but which were picked up by motor transport carriers and stripped at trucking stations within 50 miles of port. This practice is referred to as shortstopping.

In support of their contention that stripping of shippers' loads was never work traditionally performed by ILA

[8] From its inception in 1965, the amount of container traffic increased every year. Although only numbering a handful in 1965, by 1969 1 shipping company was handling 4,000 containers per year in Baltimore and by 1973 the number had grown to 25,000.

[9] The 1971 and 1974 contracts were negotiated by the Council of North Atlantic Shipping Associations (CONASA), an association of employer shipping associations, including STA and HRSA, which has been authorized to enter into collective-bargaining agreements on behalf of its members since 1971.

labor, the General Counsel and the motor carriers maintain that the ILA abandoned any claim it might have had to such work in the 1968 and 1971 Rules on Containers applicable to the area because they omitted any specific provision regarding the handling of shippers' loads. This assertion that shippers' loads were thereby unrestricted by the ILA is belied by the work history involving shippers' loads going to warehouses after the 1968 contract.

As recognized by the Administrative Law Judge and conceded by the General Counsel, following execution of the 1968 agreement, ILA longshoremen stripped shippers' loads destined for a warehouse for storage within 50 miles of port. Until the January 1973 Dublin agreement[10] in which the ILA recognized an exception for bona fide storage and agreed not to claim the right to handle import cargo to be "warehoused in the normal course of business for at least 30 days," the ILA retained jurisdiction to unload shippers' loads destined for warehouses.[11]

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[10] The Dublin agreement was not unique to Baltimore and Hampton Roads but applied also to New York.

[11] The Dublin agreement therefore took effect during the 1971 contract and thus prior to the 1974 Rules which made the first explicit reference to shippers' loads. If there was no consensus entitling ILA labor to strip shippers' loads destined for warehouses prior to 1974, then the Dublin agreement would have been a superfluous exemption under the 1971 Rules. My colleagues, while not disputing this, do overlook its significance. Though not encompassing the precise work at issue, the Dublin agreement demonstrates that, notwithstanding the absence of specific contractual provisions regarding the handling of shippers' loads prior to 1974, it was understood that not all shippers' loads could pass through port unrestricted by ILA labor. This evidence strengthens the ILA's claims concerning shippers' loads and undermines the Administrative Law Judge's reliance upon the plain language of the 1968 and 1971 Rules in casting doubt upon Respondents' claim that the shortstopping of shippers' loads violated the 1968 and 1971 Rules.

Since the inception of containerization in both Hampton Roads and Baltimore, the ILA has insisted, with the acquiescence of the shipping companies, that shippers' loads go directly to their destination intact. The only exemption from this practice was that a shipper, manufacturer, or consignee could choose to strip or stuff shippers' loads or manufacturers' loads using their own employees.[12] This agreement to allow shippers' loads to pass through port unrestricted by ILA labor, however, was never intended or interpreted to allow motor carriers or warehousemen to load or unload shippers' loads at their off-pier facilities. The traditional exemption for shippers' loads was premised on the understanding that such loads are "through" containers, much larger in size but properly analogous to a single item of bulk cargo. When taken to a trucker's warehouse to be stripped and repacked, they lose that identity. The overwhelming testimony indicates that this *shortstopping* of shippers' loads was never approved by the ILA or the shipping companies as a permissible encroachment upon the ILA's traditional work jurisdiction.[13]

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[12] The term "manufacturer's load" is essentially synonymous with that of shipper's load. A "manufacturer's label" is a single shipment transported directly, without stopping enroute, from one consignee or manufacturer to another.

[13] For example, George Maier, port manager for U.S. Lines in Baltimore and president of STA, testified that it "had always been a rule that prevailed in Baltimore" that truckers were not to strip any container that was a full shipper's load going to a single consignee. Maier further explained: "In cases where it came to our attention, prior to the delivery of such a shipment to a truckman and it came to our knowledge that the intent of the truckman was to deconsolidate this container and restuff it into his own equipment at his platform, we refused delivery of that cargo to the truckman."

The situation was similar in Hampton Roads. Jack Mace,

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This situation with respect to the handling of shippers' loads in the ports of Baltimore and Hampton Roads is in marked contrast to the agreements and practices relative to LTL and consolidated container loads in the port of New York, which were at issue in *Consolidated Express.* Containerization first appeared in New York in the late 1950's, much earlier than its advent in Baltimore and Hampton Roads. In 1959, the ILA and the New York Shipping Association (NYSA) reached an agreement in which the ILA agreed that "any employer shall have the right to use any and all type containers without restriction or stripping by the Union."[14] For years thereafter, work on any type container was done by other than ILA labor in accordance with the contractual agreement.[15] The Board concluded therefore that the ILA had bargained away its claim to the stuffing and stripping of LCL and LTL loads in question there.

There is no such restrictive contract clause in the bargaining history of the instant case.[16] Rather, as already

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executive secretary of HRSA, testified that, if a member of HRSA was informed at the pier by a motor carrier that it was going to strip a shipper's load at a trucking station, the shipping company would instruct the ILA to perform the work. Mace also testified that motor carriers in his area were aware of the enforcement of the practice relative to shippers' loads "certainly as far back as 1969."

[14] This provision was contained in sec. 8(a) of the 1959 memorandum of settlement entitled "Containers—Dravo Size or Larger."

[15] The Board indicated that, "with few exceptions," the ILA allowed all containers to cross the New York docks without rehandling.

[16] The court of appeals did not agree with the Board's abandonment theory in *Consolidated.* Nevertheless, the absence of a similar clause in the instant matter, considering the experience gained by the ILA as a result of a decade of bargaining on this issue relative to New York, acquires particular significance in my view.

indicated, the shipping companies have implicitly agreed with the ILA's demand, since the inception of containerization in Baltimore and Hampton Roads, that shippers' loads go directly to their destination intact. And, from execution of the 1968 Rules until the Dublin agreement of 1973, ILA labor, in fact, stripped shippers' loads that were instead warehoused for storage within 50 miles of port. Thus, unlike *Consolidated Express,* where the union sought to extend its jurisdiction to cover work it had bargained away, here the specificity of the 1974 Rules merely codified what had been the practice and agreement of the ILA and the shipping companies relative to shippers' loads.

In *Consolidated Express,* moreover, maritime cargo in New York was sorted and consolidated for many years by companies whose primary function was consolidation; that is, the loading and unloading of LCL and LTL loads. The Board there recognized that these consolidators "generate such work themselves, performing it not on behalf of the employer-members of NYSA but for their own customers who have goods to ship." It was further determined by the Board that the consolidator-charging parties in that case were traditionally engaged in the work of stuffing and stripping containers. In context, the ILA's claim "to strip and stuff cargo merely because that cargo was originally containerized by nonunit personnel" was construed as a claim "to engage in make-work measures."

That situation is not present here. The Charging Parties are primarily engaged in the transportation of cargo and not its loading and unloading.[17] Contrary to my colleagues'

[17] For example, Houff Transfer, Inc., first handled the containers of U.S. Lines in March 1970. In the course of its business, Houff moves a few hundred containers per year. Its president, Cletus Houff, testified, however, that Houff has more domestic business (other than container business) than steamship company container business. With respect to the operations of Associated Transport, Inc., the record discloses that approximately 10 percent of its business is in the drayage of containers in foreign commerce.

superficial assessment, this is hardly a distinction without a difference. In *Consolidated Express,* the Board stressed the record's clarity that the charging parties had "engaged in the work of stuffing and stripping containers" for many years. Especially when viewed in the context that the ILA had contractually bargained away its claim to the stuffing and stripping of the containers in question there, the persuasiveness of the ILA's claim to a lawful work preservation objective was considerably diminished. Here, however, the ILA has never relinquished its claim to stuff and strip shippers' loads which do not go to their destination intact. Nor does the record support the conclusion that the motor carriers have "traditionally" been engaged in the stuffing and stripping of such containers. With respect to the record evidence that motor carriers have shortstopped some shippers' loads at their off-pier facilities and used their own employees to strip the loads from the containers and stuff them into the motor carriers' containers for transportation to the consignees, it appears that the work was done without the knowledge of either the ILA or the shipping companies.[18] Whether predicated upon considerations of safety, state highway or bridge regulations, or economy,[19] it is apparent that the work involved could just as satisfactorily have been done at the piers by ILA

[18] Unlike *Consolidated Express,* in which the shipping documents involved showed when the LTL or LCL containers originated from or were destined to a consolidator, here, when a container is released to a motor carrier, the delivery order specifies that the cargo is to be transported to the consignee. Intent to shortstop is thereby difficult to ascertain, though the early return of the shipping company's container may demonstrate that shortstopping has, in fact, occurred. Effective enforcement of the Rules is thus difficult.

[19] Inasmuch as the trucking companies pay a per diem for each day they have a shipper's container, by immediately opening the containers and reloading them in motor transport equipment, the trucking companies can save money.

labor.[20] Viewed in this context, the Administrative Law Judge's conclusion that the ILA did not have a lawful work preservation objective incorrectly focuses on motor carrier work "traditions."

The incidents alleged here as unlawful secondary activity all involve shippers' loads destined for a beneficial owner more than 50 miles from port, but shortstopped by a motor carrier and stripped within 50 miles of port. Upon learning of these actions, the ILA complained to the appropriate joint ILA-Shipping Company Container Committee[21] that the motor carriers had violated the 1974 container rules. In every case, fines were exacted against the shipping companies which had released the containers to the motor carriers. The shipping companies, in turn, requested indemnification from the trucking companies.[22] When the

[20] ILA President Thomas Gleason explained the ILA's position as follows:

> We are not telling Associated, or Pilot, or U.S. Lines not to do business with each other. All we are saying to them is, "look we have a contract which spells out what the rules are." U.S. Lines has no right to make an agreement to bypass our contract. If Associated wants to handle these containers and they want to take it and deliver it in their truck, then come down to the pier with your truck, let the longshoremen, as they have done it for 50 or 75 years, take that cargo and put it on the truck and take it wherever you want. We have no objection to that. Otherwise, take the container and bring it to the man's place of business.

[21] Pursuant to the ILA's 1963 contract, joint container committees, representative equally of the ILA and the respective shipping associations in the ports of Baltimore and Hampton Roads, were established to resolve ILA complaints alleging violations of the container rules.

[22] The record demonstrates that, for several years prior to adoption of the 1974 contract, the trucking industry was aware that shortstopping was a violation of the container rules. Allie McNeill, vice president of D.D. Jones Transfer and Warehouse Company,

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motor carriers refused, the shipping companies canceled their respective equipment interchange agreements, thereby precluding the affected motor carriers from handling future container cargo.[23]

(footnote continued from preceding page)

Inc., a member of the Tidewater Motor Truck Association, admitted that, since 1969, he knew of the Rules and of their application to containers destined for discharge within the 50-mile radius of port. Robert McGleskey, district manager of Carolina Freight Carriers Corp., testified that, shortly after he began operations in Norfolk, Virginia, in 1970, he became aware that it was a violation of the Rules for a trucker to strip a shipper's load at its facility. McGleskey further admitted his awareness that the steamship carrier would be assessed damages for this violation. L. Chadwick, assistant manager of Hennis Freight, a member of the Tidewater Motor Truck Association, and a former employee of Associated Transport, admitted similar knowledge since 1971.

[23] A shipping company will not turn over its container to a motor carrier unless there is an equipment interchange agreement between the two carriers. In effect, this agreement is a lease which delineates the rights and obligations of the lessee-motor carrier while it has custody of the lessor-shipping company's containers.

The equipment interchange agreement used by the shipper U.S. Lines contains language giving the motor carriers "complete control" of the cargo once they transport it from the pier. This "complete control" language is one basis on which the Administrative Law Judge refutes the testimony of Respondents' witnesses that all parties understood that shortstopping of shippers' loads violated the container rules since the 1968 contract. I find the Administrative Law Judge's reasoning unpersuasive.

The interchange agreement has nothing to do with the handling of cargo but is primarily concerned with user responsibility and per diem charges. There is no language in the agreement relative to the right of the trucker to take cargo out of the container after its transfer from the shipper.

Perhaps a more significant provision in the interchange agreement is that which obligates the lessee-motor carrier to "comply with any and all appropriate formalities and requirements regarding the use, operation or transportation of the containers or chassis." This arguably binds the trucker to adhere to the shipper's obligation to the ILA as set forth in the container rules.

If work preservation is actually the objective of the 1974 container rules relative to shippers' loads, however, the economic impact on the neutral motor carriers does not thereby transform the rules and their enforcement into activity with a secondary objective.[24] Whether Rules 1(a)(3) and 2B(2) have an improper "cease doing business" objective, as found by the Administrative Law Judge, is a question of fact which must be resolved here on the basis of the work history regarding shippers' loads in the ports of Baltimore and Hampton Roads. In this vein, the critical determinant is the record's disclosure that, beginning in 1968, ILA labor stripped shippers' loads destined for a warehouse within 50 miles of port. This practice continued until the Dublin agreement of January 1973 which exempted any cargo warehoused "in the normal course of the business of the beneficial owner" for at least 30 days. The incidents of shortstopping of shippers' loads by the motor carriers for which the ILA here exacted fines, however, do not constitute permissible warehousing as defined in the Dublin agreement. These incidents therefore violated Rules 1(a)(3) and 2B(2) of the 1974 container rules. In my view, these Rules reflect the work practices and agreements between the ILA and the shipping companies relative to the handling of shippers' loads almost since the inception of containerization in the ports of Baltimore and Hampton

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[24] See, e.g., *Local 742, United Brotherhood of Carpenters and Joiners of America* [*J. L. Simmons Company, Inc.*] v. *N.L.R.B.*, 444 F.2d 895, 901 (C.A.D.C., 1971), cert. denied 404 U.S. 986; *American Boiler Manufacturers Association* v. *N.L.R.B.*, 404 F.2d 547, 552 (C.A. 8, 1968), cert. denied, 398 U.S. 960 (1970), affg. 167 NLRB 602 (1967); *N.L.R.B.* v. *Local Union No. 23 of Sheet Metal Workers International Association of Greater New York* [*Johnson Service Company*], 380 F.2d 827, 830 (C.A. 2, 1967). See also the Supreme Court's discussion of its interpretation of the historical counterpart to Section 8(b)(4)(ii)(B), in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 627 (1967).

Roads. Until the Dublin agreement, the ILA and shipping companies agreed that if shippers' loads did not go to their destination intact to be stripped and stuffed by the employees of the shipper, manufacturer, or consignee, then the unloading and reloading of such containerized loads should be done on the pier by ILA longshoremen just as they had handled break bulk cargo for decades.[25] The intervening contracts specifically confirm this. The ILA never bargained away its claim to the work in dispute. Nor in enforcing it does it seek either to expand the longshore bargaining unit by the involuntary addition of other employees or to achieve any labor relations objective outside of this unit. Against this background, I view Rules 1(a)(3) and 2B(2) of the 1974 container rules as valid work preservation provisions, the maintenance and enforcement of which violate neither Section 8(e) nor Section 8(b)(4)(ii)(B) of the Act. To conclude otherwise would be to restructure the work practices and agreements which the ILA and the shippers have negotiated in response to the momentous impact which containerization brought to the ports of Baltimore and Hampton Roads. This we do not have authority to do.

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[25] In *Northeast Marine Terminal Company, Inc.* v. *Caputo,* Docket 76—444 (June 17, 1977), the Supreme Court decided that an individual stripping a container is engaged in a "longshoring operation" within the meaning of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (Act). Although the context is concededly different from that here, the Supreme Court's discussion of containerization, in terms of moving longshoremen's work shoreward, is instructive. The Court stated:

> In effect, the operation of loading and unloading has been moved shoreward, the container is a modern substitute for the hold of the vessel. As Judge Friendly observed below, "stripping a container . . . is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on the shore and not in the ship's cargo holds."

I would further find, contrary to the Administrative Law Judge, that the ILA's 30-day suspension of the 1974 rules on April 28, 1975, did not have an objective proscribed by Section 8(b)(4)(ii)(B). In compliance with the Rules' "30 days written notice" provision, ILA notified CONASA, in late March 1975, of its intent to suspend the rules because of phony warehouse practices. It had come to the ILA's attention that truckers were attempting to circumvent the "permissible warehousing" provisions of the Dublin agreement by simply using their warehouses as deconsolidation stations. As ILA President Thomas Gleason explained, motor carriers were bringing the cargo "in the front door and out the back" and construing this as justifiable warehousing. After negotiations, the ILA and CONASA executed a supplemental agreement which "clarified and reinstated" the 1974 container rules.[26] Based on my views as expressed above, I would similarly find that the negotiations concerning the 30-day suspension of the Rules had a valid work preservation objective.

Accordingly, I would dismiss the complaint in its entirety.
Dated, Washington, D.C. August 12, 1977

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John H. Fanning, Chairman

NATIONAL LABOR RELATIONS BOARD

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[26] The clarification explained that trucking stations where containers are unloaded within 50 miles of port do not constitute bona fide public warehouses within the meaning of the Dublin 30-day warehouse exception.

Appendix B—Decision and Order of the National Labor Relations Board in Associated Transport.

ORDER CORRECTING DECISION AND ORDER

On August 12, 1977, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1]

IT IS HEREBY ORDERED that said Decision and Order be, and it hereby is, corrected by deleting the citation *"Consolidated Express,* 537 F.2d 706 (1976)." from the ninth line on page 8 and substituting therefor *"Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35, 53 (C.A.2, 1976)."

IT IS FURTHER ORDERED that the Decision and Order, as printed, shall appear as hereby corrected.

Dated, Washington, D. C., October 20, 1977.
By direction of the Board:

George A. Leet
Associate Executive Secretary

[1] 231 NLRB No. 64, Chairman Fanning dissenting.

Appendix C—Decision and Order of the National Labor Relations Board in *Dolphin*.

236 NLRB No. 42

FJM
D—3690
New York, N.Y.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AND NEW YORK SHIPPING ASSOCIATION, INC. — Cases 2—CC—1364 and 2—CE—75

and

DOLPHIN FORWARDING, INC.

and — Case 2—CC—1365

SAN JUAN FREIGHT FORWARDERS, INC.

DECISION AND ORDER

Upon charges duly filed by Dolphin Forwarding, Inc. (Dolphin), and San Juan Freight Forwarders, Inc. (San Juan), against the International Longshoremen's Association (ILA) and the New York Shipping Association, Inc. (NYSA), the General Counsel of the National Labor Relations Board, by the Regional Director for Region 2, on March 10, 1976, issued and served on the parties an order consolidating cases, consolidated complaint, and notice of hearing.

The complaint alleges that the ILA has threatened, coerced, and restrained NYSA and its employer-members

to cease doing business with Dolphin and San Juan, in violation of Section 8(b)(4)(ii)(B) and Section 8(e) of the Act by maintaining, giving effect to, and enforcing certain contracts and agreements between them with respect to the business operations of the Charging Parties.

The Respondents in their answers set forth various affirmative defenses. The General Counsel moved to strike. Administrative Law Judge Henry J. Jalette granted the General Counsel's motion. A hearing was begun and the Administrative Law Judge refused to hear evidence concerning these defenses.

Thereafter the parties entered into a stipulation and moved to transfer this proceeding directly to the Board for findings of fact, rulings on exceptions to rulings on motions, objections and offers of proof, conclusions of law, and the issuance of a decision and order. The parties waived the making of findings of fact and conclusions of law and issuance of a decision by the Administrative Law Judge. The parties also agreed that the charges, consolidated and amended complaints, notice of hearing, answers and amended answers, transcript, motions and rulings thereon, and exhibits and rejected exhibits constitute the entire record in this proceeding.

By order dated January 4, 1978, the Board approved the stipulation and transferred the proceedings to itself. All parties filed briefs and the General Counsel filed a reply brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the stipulation, the briefs, and the entire record and hereby makes the following:

Findings of Fact

I. Jurisdiction

Dolphin maintains its principal office and place of business in Hanover, Massachusetts. San Juan's office and principal place of business, on the mainland of the United States, is located in New York City. Both have used inland facilities located within a 50-mile radius of the Port of New York. In the operation of their businesses, Dolphin and San Juan, respectively, annually derive gross revenues in excess of $500,000, of which more than $50,000 is derived from shipments in interstate commerce directly from various States of the United States to the Commonwealth of Puerto Rico.

Respondent NYSA has its principal office in New York City and is an incorporated association of employer-members who are engaged in various operations involved in the shipment of general cargo between the Port of New York and foreign countries or other States and territories of the United States. Employer-members of NYSA annually carry cargo in interstate and foreign commerce valued in excess of $1 million. Dolphin, San Juan, and NYSA are engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We find it will effectuate the purposes of the Act to assert jurisdiction herein.

II. The Unfair Labor Practices

A. *Background*[1]

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[1] For a comprehensive discussion of containerization, consolidation, NYSA and ILA bargaining history, and the resultant Rules on Containers see *International Longshoremen's Association, AFL-CIO (Consolidated Express, Inc.)*, 221 NLRB 956 (1975), enfd. 537 F.2d 706 (C.A. 2, 1976), cert. denied 429 U.S. 1041 (1977), rehearing denied 430 U.S. 911 (1977) (herein *Conex*).

Dolphin and San Juan both consolidate goods from various customers for seaborne shipment by container. Steamship companies provide them with containers. They in turn solicit customers who wish to ship less-than-container-load cargo between the Port of New York and Puerto Rico. The customer transports the goods to the consolidator's facility, where they are consolidated with those of other customers and stuffed into containers. The consolidator transports the containers to the steamship companies' vessels for shipment to Puerto Rico. Both Charging Parties lease the necessary space and subcontract the labor in order to perform the consolidation.

Since 1959, NYSA and ILA have negotiated various collective-bargaining agreements and supplements regarding the use and handling of containers, known as the Rules on Containers. Briefly, these Rules require that any containers owned or leased by employer-members which contain less than trailer load, or consolidated full container loads, that originate or terminate within a 50-mile radius of the Port of New York must be "stripped" and "stuffed" by ILA labor. Employer-members agree not to supply containers to consolidators who fail to comply, and each violation is punishable by a fine of $1,000 per container.

The Charging Parties have always used facilities located within 50 miles of the port to strip and stuff containers. Neither has used ILA labor.[2] Beginning on August 27, 1974, and continuing through January 23, 1975, Respondents, through their agents, fined the steamship companies used by the Charging Parties approximately $47,000. The fines were levied because of the Charging Parties' failure to comply with the Rules. Consequently, the steamship companies involved informed the Charging Parties that

[2] During 1973 and 1974 San Juan did have 80 percent of its containers emptied and reloaded upon arrival at the pier by ILA labor.

they would no longer furnish them containers or space aboard their vessels. Dolphin and San Juan moved their operations to Jacksonville, Florida, a port not subject to the Rules, and filed the charges in this proceeding.

B. *Analysis and Findings*

We find, based on the record as a whole, that Respondent ILA violated Section 8(b)(4)(ii)(B) and Respondents ILA and NYSA violated Section 8(e) of the Act. It is clear that our decision in *Conex* is controlling. The *Conex* case involved the identical Respondents and dealt with the same Rules on Containers. The charging parties in *Conex* were also consolidating companies engaged in off-pier stripping and stuffing of containers. In that case we held that the Rules were not valid work-preservation clauses in that traditionally the off-pier stuffing and stripping of containers was performed by consolidating companies and not longshoremen. Since the work was not traditional longshore work and had never been performed by longshoremen, the Rules which required the shipping companies to stop doing business with consolidators did not have a lawful work-preservation object. Therefore the Rules and the enforcement thereof violated Sections 8(a)(4)(ii)(B) and 8(e). No legal distinction can be drawn between *Conex* and this case and the few factual differences are without legal significance.[3]

Accordingly we reject the affirmative defenses raised by Respondents, which in effect are nothing more than motions for reconsideration of our decision in *Conex*. However, Respondents have raised certain defenses with which we

[3] Here, unlike the charging parties in *Conex*, Dolphin and San Juan have never used their own employees to strip and stuff containers. Also, while the charging parties in *Conex* did, at various times, have their containers stripped and restuffed at the pier, it does not appear this was done as extensively as it has been by San Juan.

did not deal in *Conex;* these we now address:

1. *Dolphin and San Juan were subcontractors of the steamship companies:* Respondents contend that there is some form of subcontractual relationship, albeit a nebulous one, between the Charging Parties and the steamship companies. The object of this relationship was to circumvent the Rules on Containers.

There is no evidence in the record to lend the slightest credence to this contention. The testimony of the Charging Parties' officers is that they are exactly what they hold themselves out to be—independent consolidators. Both solicit customers and maintain offices. The only relationship they have with the steamship companies is limited to use of their containers and purchase of space aboard their vessels. We therefore find this defense without merit.

2. *The 8(e) charge is time barred:* Respondents contend that Dolphin voluntarily ceased shipments through the Port of New York in December 1974. Dolphin filed the charge alleging an 8(e) violation on May 6, 1975. Therefore, Respondents submit that there could be no attempted enforcement of the rules against Dolphin once they left New York, hence the charge filed in May is time barred by the 6-month statute of limitations contained in Section 10(b) of the Act.

Respondents have not denied that the last enforcement or reaffirmation of the Rules occurred on January 23, 1975, well within the 10(b) period.[4] It is the date of reaffirmation of the 8(e) contract that is relevant; consequently, when Dolphin moved its operations to Florida is of no moment.[5]

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[4] *International Organization of Masters, Mates and Pilots, AFL-CIO (Seatrain Lines, Inc.),* 220 NLRB 164 (1975).

[5] ILA additionally argues that, because the Rules, in one form or another, have been in effect since 1959, the Charging Parties are estopped from raising their validity. The fact remains that, at least regarding the Charging Parties, they were only recently enforced.

3. *I.C.C. permits:* Respondents argue that the Charging Parties are conducting business without being properly licensed by the Interstate Commerce Commission, and, therefore, are not entitled to avail themselves of the Board's processes. That contention is irrelevant. It is our duty to administer the National Labor Relations Act. In that regard we have made the requisite jurisdictional findings. There is no indication that the Rules were intended to, or do, protect the parties from the effect of any violations of other statutes or that enforcement of the National Labor Relations Act, in this context, conflicts with enforcement of any regulations or laws administered by other agencies. In any event, Respondents' recourse properly would be through such other agency, not actions unlawful under the National Labor Relations Act.

C. *Conclusions*

We find that the purpose of the Rules on Containers was to force or require employer-members of NYSA to cease or refrain from handling, transporting, or selling cargo space to consolidators who refused to use ILA labor to perform consolidation. Therefore we find that by maintaining, giving effect to, and enforcing the contracts and agreements known as the Rules on Containers, as set forth in the memorandum of understanding, executed on or about June 21, 1974, Respondent NYSA and Respondent ILA violated Section 8(e) of the Act.

We also find that Respondent ILA by fining the steamship companies, in accordance with the Rules on Containers, threatened, restrained, and coerced Respondent NYSA and its employer-members to force those persons engaged in commerce to cease doing business with Dolphin and San Juan, and thereby violated Section 8(a)(4)(ii)(B) of the Act.

III. The Remedy

Having found that Respondent ILA and Respondent NYSA have engaged in unfair practices in violation of Section 8(e), and that Respondent ILA has engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(B) of the Act we shall order that each Respondent cease and desist from the proscribed conduct and take certain affirmative action which we find necessary to remedy and remove the effects of the unfair labor practices and to effectuate the policies of the Act.

Conclusions of Law

1. New York Shipping Association, Inc., Dolphin Forwarding, Inc., and San Juan Freight Forwarders, Inc., are employers engaged in commerce within the meaning of Section 2(2) and (6) of the Act.

2. International Longshoremen's Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By maintaining, giving effect to, and enforcing the contracts and agreements known as the Rules on Containers between ILA and NYSA to the extent and in the manner said contracts and agreements have been found to be unlawful herein, Respondents ILA and NYSA have engaged in unfair labor practices within the meaning of Section 8(e) of the Act.

4. By threatening to assess and by assessing liquidated damages as provided in the above-described agreements, thereby threatening, restraining, and coercing Respondent NYSA, or any of its employer-members, with an object being to force those persons engaged in commerce to cease

doing business with Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc., Respondent ILA has engaged in unfair labor practices within the meaning of Section 8(b)(4)(ii)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. Respondent Union, International Longshoremen's Association, AFL-CIO, New York, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Maintaining, giving effect to, and enforcing the contracts and agreements known as the Rules on Containers between ILA and NYSA to the extent and in the manner said contracts and agreements have been found to be unlawful herein, or any other contract or agreement, express or implied, whereby NYSA, on behalf of its employer-members, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

(b) Threatening, coercing, or restraining NYSA, or any of its employer-members, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Notify its members who are employed by employer-members of NYSA that Respondent Union has no objections to loading or unloading containers that have been stuffed or are to be unstuffed by employees or agents of Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc.

(b) Notify all its members who are employed by employer-members of NYSA that any previous instructions, requests, or appeals made by Respondent Union to strip and restuff containers stuffed or to be unstuffed by Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc., have been withdrawn and are to have no force or effect.

(c) Notify all its members that any and all of the paragraphs contained in the contracts and agreements known as the Rules on Containers negotiated by and between ILA and the Council of North American Shipping Associations on behalf of NYSA which limit, restrain, restrict, tax, or prohibit handling, in the customary manner, containers that have been stuffed or are to be unstuffed by Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc., have been found to be void and unenforceable with respect to Dolphin Forwarding, Inc., and San Juan Freight Forwarders, Inc.

(d) Post at its business offices, meeting halls, and all dispatch halls copies of the attached notice marked "Appendix A."[6] Copies of said notice, on forms provided by the

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Regional Director for Region 2, after being duly signed by a representative of Respondent Union, shall be posted by Respondent Union immediately upon recipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including the dispatch halls and all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent Union to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent Union has taken to comply herewith.

B. Respondent New York Shipping Association, Inc., New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from maintaining, giving effect to, and enforcing the contracts and agreements known as the Rules on Containers between ILA and NYSA to the extent and in the manner said contracts and agreements have been found to be unlawful herein, or any other contract or agreement, express or implied, whereby NYSA, on behalf of its employer-members, agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Notify all its employer-members that any previous instructions, requests, or appeals which Respondent NYSA may have made against loading containers that have been stuffed or are to be unstuffed by Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc., are to be withdrawn and to have no force or effect.

Appendix C—Decision and Order of the National Labor Relations Board in Dolphin.

(b) Notify all its employees and employer-members that it has no objection to their loading, unloading or otherwise handling containers that have been stuffed or are to be unstuffed by Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc.

(c) Notify all its employer-members that any and all provisions of the contracts and agreements known as the Rules on Containers which have been negotiated between ILA and the Council of North American Shipping Associations on behalf of NYSA which restrain, restrict, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc., have been found to be void and unenforceable with respect to Dolphin Forwarding, inc., and San Juan Freight Forwarders, Inc.

(d) Mail to each of its employer-members and post at its main office in New York, New York, and at each area office copies of the attached notice marked "Appendix B."[7] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent NYSA's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employer-members are customarily posted. Reasonable steps shall be taken by Respondent NYSA to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent NYSA has taken to comply herewith.

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[7] See fn. 6, *supra.*

Appendix C—Decision and Order of the National Labor Relations Board in Dolphin.

Dated, Washington, D.C. May 30, 1978

.....
John H. Fanning, Chairman

.....
Howard Jenkins, Jr., Member

.....
Betty Southard Murphy, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX A

NOTICE TO MEMBERS

. . . . . .

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the law by committing unfair labor practices. Accordingly, we will post this notice and keep the promises made herein.

WE WILL NOT enter into, maintain in effect, give effect, to invoke, or in any manner or by any means enforce the contracts and agreements known as the Rules on Containers, rules 1, 2, 8, 9, 10, and 11 as set forth in the memorandum of understanding executed on or about June 21, 1974, or any other contract or agreement, express or implied, whereby New York Shipping Association, Inc., on behalf of its employer-members, or the Council of North America Shipping Associations, on behalf of the New York Shipping Association, Inc., agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

WE WILL NOT threaten, coerce, or restrain New York Shipping Association, Inc., or its employer-members, or any other person engaged in commerce or in an industry affecting commerce, by threatening or refusing to handle or by taxing or requiring the payment of money, or by any other means, where an object thereof is to force or require any of the member companies of the New York Shipping Association, Inc., or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the product of any producer,

processor, or manufacturer, or to cease doing business with Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc.

WE WILL and do hereby notify our members, and other individuals employed by the New York Shipping Association, Inc., or any of its employer-members, that we have no objection to their loading, unloading, or otherwise handling containers received from, or to be forwarded to, Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc.

WE WILL and do hereby cancel and withdraw any orders and instructions given to our members and any other individuals to strip and restuff containers stuffed or to be unstuffed by the employees of Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc.

WE WILL and do hereby notify all our members that any and all of the paragraphs contained in the contracts and agreements known as the Rules on Containers negotiated by and between ILA and the Council of North American Shipping Associations on behalf of NYSA which limit, restrain, restrict, tax, or prohibit handling, in the customary manner, containers that have been stuffed or are to be unstuffed by Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc., are void and unforceable.

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO
(Labor Organization)

By .....
(Representative) (Title)

Dated .....

Appendix C—Decision and Order of the National Labor Relations Board in Dolphin.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 26 Federal Plaza, Room 3614, New York, New York 10007, Telephone 212-264-0360.

Appendix C—Decision and Order of the National Labor Relations Board in Dolphin.

APPENDIX B

NOTICE

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

To Employees and all employer-members of the New York Shipping Association, Inc.:

The National Labor Relations Board has found that we violated the law by committing unfair labor practices. Accordingly, we will post this notice and keep the promises made herein.

WE WILL NOT enter into, maintain in effect, give effect to, invoke, or in any manner or by any means enforce the contracts and agreements, known as the Rules on Containers, rules 1, 2, 7, 8, 9, 10, and 11 as set forth in the memorandum of understanding executed on or about June 21, 1974, or any other contract or agreement, express or implied, whereby New York Shipping Association, Inc., on behalf of employer-members of the Council of North America Shipping Associations, on behalf of New York Shipping Association, Inc., agrees to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

WE WILL and do hereby cancel and withdraw any orders and instructions given to our employer-members, employees, or any other individual to strip and restuff containers stuffed or to be unstuffed by the employees of Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc.

WE WILL and do hereby notify all our employees and employer-members that we have no objection to their

Appendix C—Decision and Order of the National Labor Relations Board in Dolphin.

loading, unloading, or otherwise handling containers that have been stuffed or are to be unstuffed by Dolphin Forwarding, Inc., or San Juan Freight Forwarders, Inc.

WE WILL and hereby do notify all our employer-members that any and all provisions of the contracts and agreements known as the Rules on Containers which have been negotiated between ILA and the Council of North America Shipping Associations on our behalf which restrain, restrict, limit, tax, or prohibit handling, in the customary manner, containers that have been stuffed, or are to be unstuffed, by Dolphin Forwarding, Inc., and San Juan Freight Forwarders, Inc., are void and unenforceable.

NEW YORK SHIPPING ASSOCIATION, INC.
(Employer)

By .....
(Representative) (Title)

Dated .....

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, 26 Federal Plaza, Room 3644, New York, New York 10007, Telephone 212-264-0360.

Appendix D—Decision of The Administrative Law Judge in *Associated Transport.*

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO

Case No. 5-CC-791

and

ASSOCIATED TRANSPORT, INC.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL

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LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO; AND HAMPTON ROADS SHIPPING ASSOCIATION

Case No. 5-CE-48

and

ASSOCIATED TRANSPORT, INC.

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

Party to the Contract

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; ATLANTIC COAST DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 921, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1355, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1429, AFL-CIO

Case No. 5-CC-792

and

HOUFF TRANSFER, INC.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; ATLANTIC COAST DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 333, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 921, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 953, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1355, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1429, AFL-CIO

Case No. 5-CE-49

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and

HOUFF TRANSFER, INC.

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

Party to the Contract

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1736, AFL-CIO

Case No. 5-CC-793

and

HOUFF TRANSFER, INC.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL

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LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1736, AFL-CIO

Case No. 5-CE-50

and

HOUFF TRANSFER, INC.

and

COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

Party to the Contract

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1736, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1783, AFL-CIO

Case No. 5-CC-794

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TIDEWATER MOTOR TRUCK ASSOCIATION

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; HAMPTON ROADS DISTRICT COUNCIL INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 862, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 1248, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 846, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 970, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1458, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1624, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1784, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1819, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1840, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1736, AFL-CIO; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1783, AFL-CIO; COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS; AND HAMPTON ROADS SHIPPING ASSOCIATION

Case No. 5-CE-51[1]

and

TIDEWATER MOTOR TRUCK ASSOCIATION

Bruce D. Rosenstein, Esq., of
Baltimore, MD, for the
General Counsel.

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[1] At the hearing, I granted the motion of the Council of North America Shipping Associations (referred to herein as CONASA), one of the Respondents named in Case No. 5-CE-51, to intervene as a party to the contract in Cases Nos. 5-CE-48, 49, 50 and 51. However, in making that ruling, I overlooked CONASA's status as a named Respondent in Case No. 5-CE-51. Accordingly, I now amend my ruling to correct that inadvertence. The captions of Cases Nos. 5-CE-48, 49 and 50 appear as amended at the hearing. I have restored the caption in 5-CE-51 to its correct form.

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William L. Auten, Esq. (*Blakeney, Alexander & Machen*), of Charlotte, NC, on behalf of Houff Transfer, Inc.

DECISION[1]

Statement of the Case

LEONARD M. WAGMAN, Administrative Law Judge: These consolidated cases were tried before me in accordance with Section 10(b) of the National Labor Relations Act, as amended (29 U.S.C. Section 158, *et seq.*), referred to herein as the Act, on October 15, 16, 17, 22, 23 and 24, 1975. The Respondents participated in the trial pursuant to due notice and two consolidated complaints issued respectively by the Regional Director of Region 5, on September 25 and October 1, 1975, which were in turn consolidated by order of the Acting Regional Director on October 10, 1975. The consolidated complaint of October 10, 1975, alleged that all the Respondents had violated Section 8(e) of the Act and that Respondents International Longshoremen's Association and its Hampton Roads and Atlantic Coast District Councils, and ILA locals (referred to herein collectively as ILA), named in the above caption had violated Section 8(b)(4)(ii)(B) of the Act.

In summary, Cases Nos. 5-CE-48, 5-CE-50 and 5-CE-51 allege that Respondents ILA, Hampton Roads District Council and their affiliated locals in the Hampton Roads port area, the Hampton Roads Shipping Association (referred to herein as HRSA) and CONASA violated Section 8(e) of the Act by entering into, maintaining and giving effect to provisions of their current collective-bargaining agreement whereby employer-members of HRSA have

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agreed to cease doing business with Associated Transport, Inc. (referred to herein as Associated), Houff Transfer, Inc. (referred to herein as Houff) and other employer-members of Tidewater Motor Truck Association (referred to herein as TMTA). Cases Nos. 5-CC-791, 5-CC-793 and 5-CC-794 alleged that ILA, its Hampton Roads District Council and their affiliated locals in the Hampton Roads, Virginia, port area violated Section 8(b)(4)(ii)(B) of the Act by imposing fines upon employer-members of HRSA, including United States Lines, Inc. (referred to herein as U.S. Lines), by suspending a portion of the 1974-1977 collective bargaining agreement with HRSA, and by entering into, maintaining, and seeking to enforce portions of the same agreement regarding cargo containers, all with an object of compelling such employer-members of HRSA to cease doing business with Associated, Houff and other members of TMTA.

In Case No. 5-CE-49, the complaint alleges that Respondents ILA, its Atlantic Coast District Council, and their affiliated locals in the Baltimore, Maryland, port area violated Section 8(e) of the Act by entering into, maintaining and giving effect to provisions of their 1974-1977 collective-bargaining agreement with Steamship Trade Association of Baltimore, Inc. (referred to herein as STA), including U.S. Lines and Lavino Shipping Company (referred to herein as Lavino), whereby STA and its employer-members have agreed to cease doing business with Houff. Finally, Cases Nos. 5-CC-791, 793 and 794 for the purposes of comlantic Coast District Council and their affiliated locals in the Baltimore port area violated Section 8(b)(4)(ii)(B) of the Act by engaging in conduct similar to that alleged in Cases Nos. 5-CC-791, 793 and 794 for the purpose of compelling U.S. Lines and Lavino to cease doing business with Houff.

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Upon the entire record in this case, including the transcript of the trial before me, the transcript of testimony in a proceeding ancillary to the instant case, i.e., *William C. Humphrey, etc.* v. *International Longshoremen's Association, AFL-CIO, et al. and Hampton Roads Shipping Association,* Civil Action 75-441-N in the U.S. District Court for the Eastern District of Virginia, Norfolk Division, a proceeding in which the Regional Director of Region 5 sought an injunction under Section 10(1) of the Act,[2] and the parties' briefs, as corrected and supplemented, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organizations Involved

Houff, a Virginia corporation, operates freight terminals at Baltimore, Maryland and Norfolk, Virginia. Associated, a New York corporation operates a freight terminal at Virginia Beach, Virginia. Both Houff and Associated are engaged in the interstate transportation of freight by motor truck under licenses issued by the Interstate Commerce Commission. During the preceding 12 months, Houff and Associated respectively, received revenues exceeding $50,000, from their interstate freight operations.

STA is an organization composed of various steamship lines and steamship agencies doing business in the Baltimore, Maryland, port area including U.S. Lines and Lavino. It exists for the purpose, among others, of bargain-

[2] Following the adjournment of the trial in the instant case on October 24, the parties had opportunity to determine if the trial should resume for purposes of cross-examination of witnesses who had testified in the injunction proceeding. Thereafter, on December 9, 1975, upon agreement of all parties, I issued an Order in which I received the transcript in the injunction proceeding as part of the record herein, marked Joint Exhibit No. 1, and closed the hearing as of that same date.

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ing collectively on behalf of its employer-members with labor organizations, including ILA, concerning wages, hours and conditions of employment of the employees of the Associations employer-members. U.S. Lines, a New Jersey corporation, and Lavino, a Pennsylvania corporation, are engaged in the transportation of cargo by ocean-going vessels in interstate and foreign commerce. During the past 12 months, STA's employer-members received in excess of $1 million from the transportation of cargo in interstate and foreign commerce.

CONASA is, and at all times since 1971 has been, an association of employer shipping associations, including STA and HRSA, the members of which are engaged in the business of conducting collective-bargaining negotiations on behalf of their respective employer-members and entering into collective-bargaining agreements covering the employees of their employer-members. During the past 12 months, the employer-members of HRSA, including U.S. Lines, received in excess of $1 million from the transportation of cargo in interstate and foreign commerce.

TMTA is an employer association composed of 28 employer-members including Associated, which are engaged in interstate transportation and delivery of general freight and commodities in and around the Hampton Roads, Virginia area. During the past 12 months, the employer-members of Tidewater received in excess of $50,000 from the interstate transportation and delivery of freight and commodities.

At all times material herein, U.S. Lines, Lavino, Associated, Houff, the employer-members of TMTA, STA, HRSA, and CONASA, are, and each has been an "employer" as defined in Section 2(2) of the Act, engaged in "commerce" and in operations "affecting commerce" within the meaning of Section 2(6) and (7) of the Act, respectively.

I further find that ILA, Hampton Roads District Council, **Atlantic Coast District Council and ILA Locals 333, 846,** 862, 921, 953, 970, 1248, 1355, 1429, 1458, 1624, 1736, 1783, 1784, 1819, 1840 and 1970 are labor organizations within the meaning of Section 2(5) of the Act.

I conclude and find that it is proper to assert jurisdiction in these proceedings.

II. The Alleged Unfair Labor Practices

A. *The Facts*

1. The evolution of the ILA-CONASA Container Rules

Prior to the mid-1960's, when the first containerships appeared in Baltimore harbor and in the Hampton Roads port area, the ILA longshoremen unloaded bulk cargo from steamships, sorted it out on a piece basis and transported the cargo to the end of the pier for loading onto the back of a truck. There, I find from the testimony of ILA President Thomas W. Gleason, Sr., that the longshoremen's work ended with respect to import cargo. At that point, in Baltimore and in Hampton Roads, where truck transportation was involved, a freight handler would load the cargo onto the back of a truck sent by the consignee. Although the ILA has represented the freight handlers, I find from Mr. Gleason, Sr.'s testimony that they were not longshoremen. However, after the mid-1960's with the increasing use of large containers, the work opportunities associated with bulk cargo on the piers diminished.

Notwithstanding this development, ILA's collective-bargaining agreements covering longshoremen in the ports of Baltimore and Hampton Roads for the years prior to

1968 did not contain any rules regarding the extent to which longshoremen were to be utilized in the handling of containers or their contents. During those years, ILA longshoremen stripped (unloaded) import containers which held less-than trailer-load cargo (LTL).[3] However, they did not strip full shipper's loads (import containers loaded with goods belonging to a single consignee, who was also beneficial owner of the cargo) unless requested to do so by the consignee's agent or the stevedore. Thus, as a rule, ILA labor simply removed the shipper's load container from the ship to the pier, where it was picked up by a motor transport carrier.

In their 1968-1971 collective-bargaining agreement, ILA and HRSA's predecessor, Hampton Roads Maritime Association, for the first time, dealt with containerization in the bargaining unit. In this context, the provisions pertinent to this case were as follows:

> II. Rules on Containers
>
> The following provisions are intended to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts at deepsea piers or terminals. To assure compliance with the collective-bargaining provisions the following rules and regulations shall be applied.
>
> A. Definitions and Rule as to Containers Covered.
>
> Stuffing—means the act of placing cargo into a container.
>
> Stripping—means the act of removing cargo from a container.

[3] LTL cargo refers to individual shipments destined to two or more consignees which have been shipped in a single container.

Loading—means the act of placing containers aboard a vessel.

Discharging—means the act of removing containers from a vessel.

These provisions relate solely to containers meeting each and all of the following criteria:

1. Containers owned or leased by employer-signatory members (including containers on wheels) which contain LTL loads or consolidated full container loads.

2. Such containers which come from or go to any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not the beneficial owner of the cargo.

3. Such containers which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle within its radius extending out from the center of each port. It is understood that the center of Hampton Roads will be defined as Middle Ground Light.

B. Rule of Stripping and Stuffing Applied to Such Containers

A container which comes within each and all of the criteria set forth in 'A' above shall be stuffed and stripped by ILA longshore labor. Such ILA labor shall be paid and employed at longshore rates under the terms and conditions of the General Cargo Agreement. Such stuffing and stripping

shall be performed on a waterfront facility, pier or dock. No container of cargo shall be stuffed or stripped by ILA longshore labor more than once. Notwithstanding the above provisions, LTL loads or consolidated container loads of mail, of household goods with no other type of cargo in the container, and of personal effects of military personnel shall be exempt from the rule of stripping and stuffing.

C. Rules on No Avoidance or Evasion

• • • •

5. Failure to stuff or strip a container as required under these rules will be considered a violation of the contract between the parties. Use of improper fictitious or incorrect documentation to evade the provisions of 'B' shall also be considered a violation of the contract. If for any reason a container is no longer at the waterfront facility at which it should have been stuffed or stripped under the rules then the steamship carrier found guilty of intent to cause improper, fictitious, or incorrect documentation to evade the provisions of 'B' above shall pay to the joint Welfare Fund $150.00 per container which should have been stuffed or stripped.

Under the foregoing rules, ILA longshoremen, working on the piers were to strip and stuff LTL or consolidate full container loads arriving on piers in containers owned or leased by Hampton Roads Maritime Association members, and which were destined for or came from any person, not the beneficial owner of the cargo, and which came from or was destined to any point within a 50-mile radius from the center of the port. The contract also provided that ILA

was to receive a royalty for each loaded container which passed over the piers free of stripping or stuffing by "ILA longshore labor."

The 1968-1971 ILA-STA collective-bargaining agreement covering the port of Baltimore contained precisely the same container rules as were agreed to at Hampton Roads, except that the liquidated damage provision called for payment of $250 per violation instead of the $150 required under the Hampton Roads contracts.

Since 1970, HRSA and STA have authorized CONASA to bargain collectively with ILA on their behalf regarding container rules. Thus, the container rules for both ports have been uniform in their respective subsequent contracts with ILA.

The ILA's 1971-1974 collective-bargaining agreements with HRSA and STA contained the same CONASA-ILA container rules and royalty provision as found in the agreements for 1968-1971. As in the 1968-1971 contracts, there were no provisions in the 1971-1974 contracts regarding the stripping or stuffing of full shipper's loads by ILA longshore labor. On September 11, 12 and 13, 1972, 3 months after the 1971-1974 contracts were executed, CONASA and ILA representatives constituting the CONASA-ILA Container Committee met at Miami Beach, Florida, regarding containerization. The Committee discussed this same topic from January 25 to January 29, 1973, at Dublin, Ireland. The determinations reached at these meetings included the following which was promulgated in the Committee's Interpretive Bulletin No. 1:

INTERPRETATION 1.1

Containers Covered

The rules on containers relate solely to containers meeting either of the following criteria:

(a) Containers owned or leased by carriers (including containers on wheels) which contain LTL loads or consolidated full container loads, which come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

(b) Containers which come from or go to any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo and including a forwarder, who is either a consolidator of outbound cargo or a distributor of inbound cargo) who is not a beneficial owner of the cargo and such containers come from or go to any point within a geographical area of any port in the North Atlantic District described by a 50-mile circle with its radius extending out from the center of each port.

Prior to the 1968 ILA collective-bargaining agreements with HRSA and STA, a warehouse driver as a matter of practice took full shippers' load from a prier, unstripped by ILA longshore labor and delivered it to a warehouse, where warehouse employees would strip the container of its contents and store them. Beginning in 1969, following the execution of the 1968 agreement, ILA longshoremen stripped full shipper's loads which were to be delivered to a warehouse for storage within a 50-mile radius of the center of the port. ILA freight handlers loaded the freight onto trucks for delivery to the warehouse. At Dublin, in January 1973, the CONASA-ILA Container Committee agreed to the following modification of their rules:

• • •

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1. DEFINITIONS

A. *Warehousing*

A beneficial owner does not violate the Rules on Containers when he warehouses his goods in bona fide public warehouses under the following conditions:

1. The container cargo is warehoused at a bona fide public warehouse;
2. The beneficial owner pays the normal labor charges in and out, and the normal warehouse storage fees for a minimum period of thirty or more days; and
3. The cargo is being warehoused (a) in the normal course of the business of the beneficial owner (b) title to such goods has not been transferred from the beneficial owner to another, and (c) it is contemplated that such transfer of title will not take place for at least 30 days after the warehousing of the cargo. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1.
4. The beneficial owner furnishes all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2 and 3 have been met.
5. This definition is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a distribution station and treated accordingly.

• • •

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The ILA-HRSA and ILA-STA contracts, effective October 1, 1974 until September 30, 1977, included the Dublin 30-day warehouse provisions as Rule 2(B)(4).

These contracts also departed from the 1971-1974 contracts with respect to the language of their container rules. The 1974-1977 CONASA-ILA rules on containers include the following:

Rules

• • •

Definitions:

• • •

(g) Qualified Consignee—Means the purchaser or one who otherwise has a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the import cargo being transported and who is named in the delivery order.

(h) Consolidated Container Load—means a container load of cargo where such cargo belongs to more than one shipper on export cargo or one consignee on import cargo.

Rule 1—Containers To Be Loaded or Discharged By Deepsea ILA Labor

(a) Cargo in containers referred to below shall be loaded into or discharged out of containers only at a waterfront facility by ILA deepsea labor:

(1) Containers owned, leased or used by carriers (including containers on wheels and trailers), hereinafter 'containers,' which contain consolidated container loads, which come from or go to any point within a geographic area of any CONASA port described by a 50-mile circle with its radius extending out from the center of each port, (hereinafter 'geographic area') or

(2) Containers which come from a single shipper which is not the manufacturer ('manufacturer's label') into which the cargo has been loaded (consolidated) by other than its own employees and such containers come from any point within the 'geographic area,' or

(3) Containers designated for a single consignee from which the cargo is discharged (deconsolidated) by other than its own employees within the 'geographic area' and which is not warehoused in accordance with Rule 2(B).

• • •

Rule 2—Containers Not be Loaded or Discharged by ILA Labor

Cargo containers referred to below shall not be loaded or discharged by ILA labor:

A. Export Cargo

• • •

B. Import Cargo

• • •

(2) Containers discharged at a qualified consignee's facility by its own employees.

• • •

Under the 1974-1977 container rules, ILA labor is entitled to strip full shippers' loads, whenever such work is to be done within a 50-mile radius of the center of the port by other than the consignee's employees. Under Rule 7(c) of the 1974-1977 CONASA-ILA contract, the amount of damages for each violation of this rule or the warehouse rule is $1000.

2. The employment of motor carriers to transport full shippers loads from piers to consignees

Since the inception of containerization at the port of Baltimore, and in the port area of Hampton Roads, respectively, a motor carrier, typically, has been selected by a shipping agent or broker, to transport a shipper's load to the consignee. The broker or agent provides the carrier with a delivey order and a bill of lading which authorizes release of the shipper's load. The delivery order requests that the water carrier deliver the cargo listed on the order for transportation to the consignee. The bill of lading is a contract between the shipper or shipper's agent and the motor carrier which governs the movement of the shipper's load to the consignee. Neither the delivery order nor the bill of lading prohibit the motor carrier from stripping the shipper's load from the container. The motor truck carriers have not been, and are not parties to the ILA's collective-bargaining agreements covering longshore operations in Baltimore or Hampton Roads. Nor have they agreed to be bound by the rules on containers set forth in those agreements. Typically, the containers listed on the delivery order and bill of lading are the property of the shipping company responsible for the cargo's ocean transportation. Under established practice, the water carrier will not turn over its container to a motor carrier unless there is an equipment interchange agreement between the two carriers. Such an agreement sets out the rights and obligations of the lessee-motor carrier when it has custody of the lessor-water carrier's containers. The equipment interchange agreement used by U.S. Lines in its dealings with Houff is typical of such agreements, and contains the following language which I find significant in determining industry practices:

United States Lines, Inc.
EQUIPMENT INTERCHANGE AGREEMENT

• • •

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FOURTH: The lessee shall:

(a) complete promptly and expeditiously the use for which the containers or chassis has been furnished to it and return the container or chassis to the terminal of the lessor from which it was received or to such other point as may be shown on the Equipment Interchange Receipt and Inspection Report or otherwise mutually agreed in writing;

* * *

(c) comply with any and appropriate formalities and requirements regarding the use, operation or transportation of the containers or chassis;

* * *

(e) have complete control and supervision of such containers or chassis while in its custody and possession; and shall control the detail of the work of any employee or agent operating or using said containers or chassis during such time any person operating, transporting, in possession of, or using any such container or chassis after the signing of said Equipment Interchange Receipt and Inspection Report and until such form is again signed upon return of the container or chassis to the lessor is not the agent or employee of the lessor for any purpose whatsoever; . . .[4]

[4] On June 28, 1973, U.S. Lines subscribed to the Uniform Intermodal Interchange Agreement (UIIA) which now governs the terms of all U.S. Lines interchange agreements with other signatories of that agreement. Associated subscribed to UIIA on September 3, 1974. Houff became a signatory on March 25, 1974. Paragraph 4 of that agreement provides in relevant part:

'4. Use of Equipment'

4.1 Responsibility of User in Possession of Equipment.

a. User shall have the right of complete control and

(footnote continued on following page)

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As a matter of practice, when the motor carriers truck arrives at the pier, the driver presents the delivery order and bill of lading, locates and takes custody of the container and drives it through safety inspection. After satisfying the inspection, the truckdriver signs an interchange release receipt and hauls the containers away pursuant to instructions from his employer. Normally, the truckdriver hauls the container to the motor carrier's port area terminal.

Frequently, after hauling a full shipper's load from a pier to its port area terminal, a motor carrier will utilize its own employees to strip the full shipper's load from the container and stuff it into the motor carrier's container for transportation to the consignee. The motor carrier's decision to strip the full shipper's load may rest upon consideration of economy, safety or state highway and bridge regulations.

In 1969, U.S. Lines handled 4000 to 5000 import containers through its Baltimore terminal. This number grew to 25,000 in 1974. Eighty to 85 percent of these containers were full shipper's loads. In 1974, Baltimore ILA labor stripped 2 to 3 hundred of these containers at the pier. Approximately 100 trucking concerns are engaged in hauling these containers away from U.S. Lines' pier.

I have studied the available records of the ILA-STA Joint Container Committee which was established under the 1968 contract, and has been retained to the present under subsequent contracts, to resolve ILA complaints

(footnote continued from preceding page)

supervision of equipment while in its possession and shall be responsible for returning the equipment in the same condition as received, ordinary wear and tear excepted.

alleging violations of the container rules.[5] It was, at the time, difficult to determine from these records whether the ILA's complaint in a particular case involved a shipper's load. However, where there was any doubt as to the type of load involved, I have assumed that such cases involved shipper's loads. From these records, I have determined that from September 1969 until November 1974, the ILA filed with the STA-ILA Joint Container Committee, 26 complaints involving the stripping of 45 to 50 shipper's loads by trucking firms from containers. These complaints alleged that by permitting such stripping the named STA member had violated the STA-ILA container rules. Five of the ILA complaints involving a total of eight containers occurred prior to the CONASA-ILA container committee meeting on September 11-13, 1972, at Miami Beach. The remaining ILA complaints involving the stripping of shipper's loads by truckers bear dates later than September 13, 1972.

The record does not reflect the annual volume of import containers received in the Hampton Roads port area. However, the Respondents submitted HRSA-ILA Container Grievance Committee records covering the period from October 1969 through and including October 1974. Again, these records do not clearly establish which cases involved full shipper's loads which were stripped by truck operators. However, I have resolved all doubts in favor of the shipper's load designation. In all, I found seven ILA complaints regarding shipper's loads allegedly stripped by truckers in violation of the HRSA-ILA contract. These complaints involved 30 containers. Of these seven

[5] The 1968 contract provided, in pertinent part, as follows:
A committee represented equally by management and Union shall be formed and shall have the responsibility and power to hear and pass judgment on any violations of these rules. . . .

cases, one, involving one import container bearing a full shipper's load, arose prior to the September 1972 CONASA-ILA Container Committee meeting in Miami, Florida.

3. The incidents involving Houff, Associated and other truck carriers

On February 19, 1974, Houff sent one of its tractors to the U.S. Lines' Dundalk Marine Terminal, in the port of Baltimore, to pick up two U.S. Lines 20 foot containers, each a full shipper's load, with a total cargo weight of 78,810 pounds. ILA longshoremen had off loaded the containers from a ship onto the pier. The delivery order and bill of lading issued to Houff for the U.S. Lines containers showed the cargo was destined to Union Carbide Corporation, Alloy, West Virginia. The Houff driver also picked up a third 20 foot container, a shipper's load from Lavino consigned to Merck & Co., Elkton, Virginia. ILA longshoremen had previously offloaded this container from a ship onto the pier. Upon determining that the three containers were overloaded, that they were unsafe, and that their rental was a needless expense, Houff stripped them and reloaded the cargo into Houff trailers.

On February 19, 1974, the ILA learned that Houff had stripped the three containers. On the following day, ILA complained to the STA-ILA Container Committee that Houff had violated "the container agreement," and that therefore liquidated damages of $1,000 and $2,000 were due the ILA from Lavino and U.S. Lines, respectively. On March 21, the STA-ILA Container Committee determined that U.S. Lines had violated the contract as alleged by ILA and assessed a fine of $2,000 against U.S. Lines. Similarly, on May 10, the Committee found that Lavino was guilty of violating the container agreement,

and assessed a fine of $1,000 against that firm. Thereafter, U.S. Lines and Lavino paid the fines to the STA-ILA Container Royalty Fund, and requested indemnification from Houff. U.S. Lines threatened to terminate Houff's interchange agreement, if Houff did not comply, Lavino theratened to have Houff entirely banned from the port. Houff did not respond to either requests. Effective July 22, 1974, U.S. Lines terminated its equipment interchange agreement with Houff. Six months later, Lavino threatened to have Houff entirely banned from ment with Houff.

Following cancellation of their equipment interchange agreements with Houff, U.S. Lines and Lavino have refused to release containers to Houff. Thus, for example, in January 1975, U.S. Lines denied a consignee's request that two U.S. Lines containers containing shipper's loads of twine be released to Houff for movement from Norfolk to Staunton, Virginia. U.S. Lines advised the consignee that it would not release containers because Houff was not party to a U.S. Lines interchange agreement.

On September 24, 1974, after being selected by a broker and receiving delivery orders and bills of lading, Associated sent two tractors to the Marine Terminal, Norfolk, Virginia. There, in accordance with their documents, the Associated drivers picked up eight shippers' loads in containers either owned or leased to U.S. Lines, which had been offloaded from a U.S. Lines ship by ILA longshoremen. When the eight containers arrived at Associated's Virginia Beach terminal, 7 or 8 miles from the Marine Terminal, the manager decided to strip all eight containers and reload the shipper's loads into Associated containers for shipment to consignees in Tennessee and North Carolina.

On October 5, 1974, a U.S. Lines representative and an ILA representative discovered that the eight U.S. Lines

containers had been stripped at Associated's Virginia Beach terminal. Thereafter, the ILA complained to the HRSA-ILA Container Committee which met on October 31 and fined U.S. Lines $8,000. In its letter notifying U.S. Lines of the fine, HRSA explained:

> The prime reason for imposing a violation of these containers was due to the fact that Associated Transport, Inc., representatives at the meeting would not clarify as to whether the containers were stripped within the 50 mile radius or delivered to their respective destinations, but only stated that they supported the contents of the letter from the Tidewater Motor Carriers Association dated June 7, 1974.[6]

By letter of January 3, 1975, U.S. Lines demanded payment of $8,000 from Associated to cover the fines imposed by the HRSA-ILA Container Committee. Associated did not comply. On February 15, U.S. Lines discontinued interchanging equipment with Associated. On March 20, 1975, U.S. Lines formally terminated it interchange agreement with Associated.

In circumstances similar to those found in the Associated and the Houff incidents, involving shipper's loads, the HRSA-ILA Container Committee levied two additional

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[6] The letter referred to by HRSA was addressed to Jack W. Mace, HRSA's executive secretary, and set forth the Tidewater Motor Truck Association's position as to HRSA's container rule, as follows:

1. Carriers would not allow the ILA to inspect the records or facilities verifying movements of containers.
2. That carriers reject payment of any penalty passed on to them by steamship lines.
3. That carriers not be required to move containers to destination under a house-to-house basis unless exclusive use of vehicle was authorized.

$1,000 fines on U.S. Lines. One of these ILA complaints involved one stripped container at Pilot Freight Carriers' Portsmouth, Virginia, terminal. A second complaint described a stripped container at Thurston Motor Lines' Chesapeake, Virginia, terminal. Both truck terminals are within 50 miles of the center of Hampton Roads. Pilot did not respond to U.S. Lines' February 5, demand for reimbursement. By letter of February 14, 1975, U.S. Lines referred to its demand and warned Pilot that "after today the interchange of equipment with you" would be discontinued "until the situation involved is settled."

The record does not reflect whether U.S. Lines sent a similar letter to Thurston. However, by letter dated February 5, 1975, U.S. Lines warned that Thurston would be held liable for stripping a full shipper's load destined for a consignee located more than 50 miles from Hampton Roads. The record does not disclose whether Thurston suffered a loss of its U.S. Lines interchange agreement.

4. The suspension of the 1974 CONASA-ILA Container Rules

In late March 1975, ILA notified CONASA of its intent to exercise its right[7] to suspend the Rules on Containers in their collective-bargaining agreements covering Baltimore, Hampton Roads, and all other CONASA ports, because of "phony warehouse practices." On April 28, the Rules on Containers were suspended. Thereafter, deepsea ILA labor at the effected piers, stripped all import containers of cargo consigned to warehouses within 50 miles of the

[7] Rule 8 of the CONASA-ILA Rules on Containers provides: These Rules shall be in effect for the term of the CONASA-ILA Agreement, provided, however, that either party shall have the right to cancel the Rules on Containers at any time on or after December 1, 1974, on thirty (30) days written notice of a desire to renegotiate the provisions of these Rules.

center of the port.[8] Freight handlers stripped the cargo into motor transport carriers' containers for delivery to the warehouse. The ILA's action caused delays of 5 to 8 days in the movement of container cargo from the piers to warehouses. The suspension also resulted in the diversion of import container shipments from the Hampton Roads port area.

On May 30, 1975, following negotiations, CONASA and ILA executed a supplemental agreement which, they announced, "clarified and reinstated" the 1974 CONASA-

[8] Rule 2B(4) of the 19974 CONASA-ILA Rules on Containers provides as follows with regard to warehousing:

> Cargo in containers referred to below shall not be . . . discharged by ILA labor:
>
> * * *
>
> B. Import Cargo:
>
> * * *
>
> (4) Containers of a qualified consignee discharged at a bona fide public warehouse within the "geographic area" which comply with all of the following conditions:
>
> 1. The container cargo is warehoused at a bona fide public warehouse.
>
> 2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days, and;
>
> 3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another. The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2, and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or de-consolidator.

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ILA container rules. Rule 2B(4) in the supplement provided:

> Cargo in containers referred to below shall not be . . . discharged by ILA labor:
>
> • • •
>
> B. Import Cargo
>
> • • •
>
> (4) Containers of a qualified consignee discharged at a bona fide public warehouse within the 'geographic area' which comply with all of the following conditions:
>
> 1. The container cargo is warehoused at a bona fide public warehouse
>
> 2. The qualified consignee pays the normal labor charges in and out; and the normal warehouse storage fees for a minimum period of thirty or more days; and stores the cargo for a minimum period of 30 days; and
>
> 3. The cargo being warehoused (a) in the normal course of the business of the qualified consignee; (b) title to such goods has not been transferred from the qualified consignee to another.
>
> The carrier on request will furnish all documentation and other information which permits the Container Committee in the port to determine whether conditions 1, 2, and 3 have been met. This exception shall not apply where cargo is warehoused for the purpose of avoidance or evasion of Rule 1. It is limited to containers warehoused as provided in the above conditions and any warehouse which does not conform to such conditions shall be deemed a consolidator or deconsolidator.

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> (Clarification: In keeping with prior CONASA-ILA decisions trucking stations where containers are unloaded within the geographic area do not constitute bona fide public warehouses even where cargo is destined for delivery outside the geographic area.)

Since May 30, 1975, these warehouse rules and the "Clarification" have been in effect in Baltimore, Hampton Roads, and all other CONASA ports.

B. *Analysis and Conclusions*

The General Counsel and the Charging Parties contend that Respondents violated Section 8(e) of the Act by maintaining, giving effect to and enforcing Rule 1(a)(3) and Rule 2B(2) of the CONASA-ILA Rules on Containers in their 1974-1977 contracts. The General Counsel also contends that by imposing fines upon U.S. Lines and Lavino, ILA violated Section 8(b)(4)(ii)(B) of the Act. According to the General Counsel and Charging Parties, these portions of the CONASA-ILA container rules and the attempts to enforce them by fines constituted an attempt by ILA to acquire work traditionally done by employees of motor carriers.

The Respondents' defense is that Rule 1(a)(3) and Rule 2B(2) and their enforcement represented an effort to preserve work traditionally performed by ILA labor and that therefore such efforts were authorized by principles set forth in *National Woodwork Manufacturing Association* v. *N.L.R.B.*, 386 U.S. 612 (1967) and *American Boiler Manufacturing Association* v. *N.L.R.B.*, 404 F. 2d 547 (C.A. 8, 1968) cert. denied 398 U.S. 960 (1970). Under those principles, if ILA's conduct and contractual agreements with CONASA, HRSA and STA, of which the General Counsel complains, were designed to preserve work to which ILA represented-employees of HRSA's and STA's employer-

members were entitled, then both the conduct and the agreements would be primary in purpose and would not run afoul of the Act. However, if ILA's real object was to reach out for work traditionally done by employees not represented by ILA, or work to which ILA had waived all claims, the challenged container rules and the pressures on HRSA and STA would have had a secondary object violative of Section 8(e) and 8(b)(4)(ii)(B) of the Act, respectively. Here, "[t]he touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." *National Woodwork Manufacturing Association, supra,* 386 U.S. at 645. Applying the *National Woodwork* test as did the Board in *International Longshoremen's Association, AFL-CIO (Consolidated Express, Inc., and Twin Express, Inc.),* 221 NLRB No. 144 (1975), enf'd —— F. 2d —— (Docket No. 75-4266, and 76-4003, June 29, 1976),[9] I find merit in the General Counsel's and the Charging Parties contentions.

In international Longshoremen's Association, AFL-CIO *(Consolidated Express, Inc. and Twin Express, Inc.), supra,* the Board found that the ILA was attempting to obtain the work of stuffing and stripping less-than-container load cargo or less-than-trailer load cargo, which consolidators traditionally performed at their own off-pier facilities with their own employees, who were not in the unit represented by the ILA. The Board observed that "the traditional work of the longshoremen represented by ILA has been to load and unload ships. When necessary to perform their loading and unloading work, longshoremen have been required to stuff and strip containers on the

[9] On July 9, 1976, International Longshoremen's Association, AFL-CIO and New York Shipping Association, Inc., filed a petition for rehearing in Dockeet No. 75-4266 which the U.S. Court of Appeals for the Second Circuit denied on August 6, 1976.

pier." (221 NLRB No. 144, slip op. p. 11). The Board then found (Id. at p. 12) that:

> the on-pier stripping and stuffing work performed by longshoremen as an incident of loading and unloading ships does not embrace the work traditionally performed by Consolidated and Twin at their off-pier premises . . . . Yet, ILA's demands here could only be met if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA.

On these facts, the Board held that the 1971 container rules negotiated between ILA and the New York Shipping Association (these same rules appeared in the 1971 ILA contracts covering the Baltimore and Hampton Roads port areas, respectively) covering LTL or consolidated full container loads did not have a "lawful primary object" (*Consolidated Express, supra,* at p. 15), and therefore violated Section 8(e) of the Act. The Board also held that fines imposed by ILA upon shipping companies who were members of the New York Shipping Association also violated Section 8(b)(4)(ii)(B) of the Act.

Here, as in *Consolidated Express,* the facts show that ILA's demands can only be satisfied "if the work traditionally performed off the pier by employees outside the longshoremen unit were taken over and performed at the pier by longshoremen represented by ILA." Thus, the history of the longshoremen's work tradition in Baltimore and Hampton Roads shows that their role in handling breakbulk import cargo ended at the head of the pier, where an ILA freight handler picked up the cargo and loaded it onto a truck. Thereafter, the fate of that cargo was the responsibility of the motor carrier, as set forth in the bill of lading.

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The advent of containerization in the ports of Baltimore and Hampton Roads did not change the traditional role of the ILA longshoremen. The motor carriers have treated import shipper's loads destined for consignees located more than 50 miles from the center of the port of entry much as they did break bulk cargo. For, with very rare exceptions, motor carriers have freely picked up the steamship companys' containers mounted on wheeled trailers and hauled then to the consignee in accordance with the bills of lading. The motor carriers have also traditionally hauled such containers to their own truck terminals and have stripped the shippers' loads from them and are loaded into their own trailers, using truck terminal employees, whenever considerations of state regulation, safety or economy persuaded a motor carrier to take that precaution.

To counter the General Counsel's showing, Respondents presented evidence to show that ILA, CONASA, HRSA, STA, and various steamship and motor truck employers in the Baltimore and Hampton Roads port areas understood that such short-stopping of shippers' loads violated the container rules in the 1968 and 1971 contracts. However, the plain language of the 1968 and 1971 rules limited to "LTL loads or consolidated full container loads" the "complete control" language of the equipment interchange agreements used by U.S. Lines in dealing with motor carriers, and the Paucity of grievances involving shipper's loads in the ports of Baltimore and Hampton Roads prior to the September 1972 CONASA-ILA meeting at which ILA first sought adoption of Rule 1(a)(3) and 2B(2) cast doubt upon the Respondent's claim. The fatal weakness in Respondents' defense is its failure to rebut the General Counsel's showing that in the performance of contracts to haul cargo from a pier to the consignee, motor carriers have traditionally utilized their own employees whenever economy, safety or government regulations required the stripping of a

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shipper's load destined to a consignee outside the 50-mile zone.

From the foregoing and the record as a whole, I find that the traditional on-pier work of longshoremen has not included the work performed by the employees of motor carriers, as Associated and Houff, at their off-pier facilities. Thus if ILA's demand is to be satisfied here, motor carriers seeking to do business with employer-members of HRSA and STA would be obliged to assign this work to ILA labor at the pier. Indeed, in order to avoid the sanctions revealed in this case, motor carriers who might otherwise exercise their discretion to transfer cargo after leaving a CONASA-ILA pier, would permit ILA labor to routinely strip all shippers' loads destined outside the 50-mile zone, and thus transform containers into cargo nets.

Here, I find as the Board found in *Consolidated Express, supra,* 221 NLRB slip op. at p. 12, "the *National Woodwork, supra,* and *American Boiler Manufacturing Association* v. *N.L.R.B.,* cases are distinguishable from the instant case since, in those cases, the very work claimed had once been performed exclusively, by employees in the unit represented by the respondent organizations therein." Thus, here, as in *Consolidated Express, supra,* Rules 1(a)(3) and 2B(2) of the 1974-1977 CONASA-ILA Rules on Containers have no valid work preservation purpose. Their purpose is to cause U.S. Lines, Lavino and other employer-members of HRSA and STA to cease doing business with motor carriers who refuse tc surrender to ILA's attempt to acquire work now done by the motor carriers' employees. I find therefore that by maintaining, giving effect to, and enforcing the contracts and agreements known as the Rules on Containers, as set forth in the 1974-1977 collective-bargaining agreements and as reaffirmed in their Supplemental Agreement of May 30, 1975, Respondents CONASA, HRSA,

and ILA violated Section 8(e) of the Act. I also find that by threatening to assess and by assessing liquidated damages as provided in those agreements, thereby threatening, restraining and coercing CONASA, HRSA, STA, U.S. Lines and Lavino, with an object being to force those persons engaged in commerce to cease doing business with Associated, Houff, Pilot and Thurston, Respondent ILA violated Section 8(b)(4)(ii)(B) of the Act.

I also find that an objective of the suspension of the Rules on Containers on April 28, 1975, was to pressure CONASA, HRSA, STA and their employer-members to cease doing business with motor carriers who refused to adhere to Rules 1(a)(3) and 2B(2). In making this finding, I have looked in large part at the timing of ILA's notice of suspension in late March. For, it was in March and February 1975 that U.S. Lines suspended its equipment interchange agreements with Associated, Thurston and Pilot because they stripped shippers' loads destined beyond the 50-mile zone and demonstrated the apparent refusal of the motor carriers to surrender to ILA pressure. Further evidence of ILA's unlawful intent is contained in the declaration in the CONASA-ILA Supplemental Agreement of May 30, 1975 that "trucking stations where containers are unloaded within the geographic area [50 miles of the center of each port] do not constitute bona fide public warehouses even where cargo is destined for delivery outside the geographic area." Having found that ILA's suspension of the 1974-1977 CONASA-ILA Rules on Containers was motivated at least in part by the same cease-doing business object which provoked the fines against U.S. Lines and Lavino. I further find that by that conduct, ILA again violated Section 8(b)(4)(ii)(B) of the Act.

The Remedy

Having found Respondent ILA and Respondents HRSA

and CONASA to have engaged in unfair labor practices in violation of Section 8(e) of the Act, and Respondent ILA to have engaged in unfair labor practices in violation of Section 8(b)(4)(ii)(B) of the Act, I shall recommend that they cease and desist therefrom and take certain affirmative action which I find necessary to effectuate the policies of the Act.

Upon the basis of the foregoing findings and conclusions and the entire record in this case, and pursuant to Section 10(c) of the Act, I issue the following recommended:[10]

ORDER

A. Respondents International Longshoremen's Association, AFL-CIO, Hampton Roads District Council, International Longshoremen's Association, AFL-CIO, ILA Locals 846, 862, 970, 1248, 1458, 1624, 1736, 1783, 1784, 1819, 1840 and 1970, AFL-CIO, their officers, agents and successors shall:

1. Cease and desist from:

(a) Maintaining, giving effect to and enforcing the contracts and agreements known as the CONASA-ILA Rules on Containers to the extent and in the manner said contracts and agreements have been found to be unlawful herein, or any other contract or agreement, express or implied, whereby CONASA, and HRSA, on behalf of its employer-members, agree to cease or refrain from doing

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[10] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

business with any other person in violation of Section 8(e) of the Act.

(b) Continuing to seek or impose fines against employer-members of HRSA, including U.S. Lines, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Associated Transport, Inc., Houff Transfer Inc., Pilot Freight Carriers, Inc., Thurston-Motor Lines, Inc., or any other employer-members of Tidewater Motor Truck Association.

(c) In any other manner, including the suspension of the CONASA-ILA Rules on Containers, coercing or restraining CONASA, HRSA or any of HRSA's employer-members, or any other person engaged in commerce in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Associated Transport, Inc., Houff Transfer, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other employer-members of Tidewater Motor Truck Association.

2. Take the following affirmative action which if found necessary to effectuate the policies of the Act:

(a) Notify all of their members who are employed by employer-members of HRSA, that any and all of the provisions known as the CONASA-ILA Rules on Containers which have been negotiated between ILA and CONASA on behalf of HRSA which restrain, restrict, limit, fine, or prohibits handling in the customary manner, containers bearing shippers' loads, have been found to be void and unenforceable with respect Associated Transport, Inc., Houff Transfer, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or any other employer-member of Tidewater Motor Truck Association.

(b) Post at all of their respective business offices, meeting halls, and dispatch halls copies of the attached notice marked "Appendix A."[11] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by a representative of each Respondent labor organization named in this section of the Order, shall be posted by each of the said labor organizations immediately upon receipt thereof, and be maintained by each of them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by said labor organizations to ensure that these notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps each of said labor organization has taken to comply herewith.

B. Respondents International Longshoremen's Association, AFL-CIO; Atlantic Coast District Council, International Longshoremen's Association, AFL-CIO, ILA Locals 333, 921, 953, 1355 and 1429, AFL-CIO, their officers, agents and representatives shall:

1. Cease and desist from:

(a) Maintaining, giving effect to and enforcing the contracts and agreements known as the CONASA-ILA Rules on Containers to the extent and in the manner said con-

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[11] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall be changed to read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tracts and agreements have been found to be unlawful herein, or any other contract or agreement, expressed or implied, whereby CONASA, and STA, on behalf of its employer-members, agree to cease and refrain from doing business with any other person in violation of Section 8(e) of the Act.

(b) Continuing to seek or impose fines against employer-members of STA, including U.S. Lines, and Lavino, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Houff Transfer, Inc.

(c) In any other manner, including the suspension of the CONASA-ILA Rules on Containers, coercing or restraining CONASA, STA or any of STA's employer-members, or any other person engaged in commerce in an industry affecting commerce, where an object thereof is to force or require such persons to cease doing business with Houff Transfer, Inc.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Notify all of their members who are employed by employer-members of STA, that any and all of the provisions known as the CONASA-ILA Rules on Containers which have been negotiated between ILA, and CONASA, on behalf of STA, which restrain, restrict, limit, fine, or prohibit handling in the customary manner, containers bearing shippers' loads, have been found to be void with respect to Houff Transfer, Inc.

(b) Post at all of their respective business offices, meeting halls, and dispatch halls copies of the attached notice marked "Appendix B."[12] Copies of said notice, on forms

[12] See footnote 11, *supra*.

provided by the Regional Director for Region 5, after being duly signed by a representative of each Respondent labor organization named in this section of the Order, shall be posted by each of the said labor organizations immediately upon receipt thereof, and be maintained by each of them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by said labor organizations to ensure that these notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps each of said labor organizations has taken to comply herewith.

C. Respondents Council of North Atlantic Shipping Associations, (CONASA), and Hampton Roads Shipping Association (HRSA), their respective officers, agents, successors, and assigns shall:

1. Cease and desist from maintaining, giving effect to, and enforcing the contracts and agreements known as the CONASA-ILA Rules on Containers to the extent and in the manner said contracts and agreements have been found to be unlawful herein, or any other contract or agreement, expressed or implied whereby Respondent CONASA, on behalf of its member, HRSA, and on behalf of its employer-members, including U.S. Lines, agree to cease or refrain from doing business with any other person in violation of Section 8(e) of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) HRSA shall notify U.S. Lines and all other employer-members of HRSA that any and all provisions of

the contracts and agreements known as the CONASA-ILA Rules and Containers, which have been negotiated between ILA and CONASA on behalf of HRSA, and which restrain, restrict, limit, fine or prohibit handling in the customary manner, containers bearing shipper's loads, have been found to be void and unenforceable with respect to, Associated Transport, Inc., Pilot Freight Carriers, Inc., Thurston-Motor Lines, Inc., or any other employer member of Tidewater Motor Truck Association.

(b) CONASA shall notify U.S. Lines and all other members of HRSA that any and all of the provisions known as the CONASA-ILA Rules on Containers which have been negotiated between ILA and CONASA on behalf of HRSA which restrain, restrict, limit, fine, or prohibit handling in the customary manner, containers bearing shipper's loads, have been found to be void and unenforceable with respect to, Associated Transport, Inc., Pilot Freight Carriers, Inc., Thurston Motor Lines, Inc., or other employer-member of Tidewater Motor Truck Association.

(c) HRSA shall mail to U.S. Lines and each of HRSA's other employer-members, and post at its Norfolk, Virginia office copies of the attached notice marked "Appendix C."[13] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent HRSA's representative shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employer-members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) CONASA shall mail to HRSA, U.S. Lines, and each of the other employer-members of HRSA, and post

[13] See footnote 11, *supra.*

at CONASA's main office in New York, New York, copies of the attached notice marked "Appendix D."[14] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent CONASA's representative shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to member Associations are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 5, in writing, with 20 days from the date of this Order, what steps Respondents CONASA and HRSA have taken to comply herewith.

Dated at Washington, D.C. Aug 19 1976

LEONARD M. WAGMAN
Leonard M. Wagman
Administrative Law Judge

[14] See footnote 11, *supra.*

Appendix E—Administrative Law Judge's Order Striking All Affirmative Defenses in *Dolphin*.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Cases Nos. 2-CC-1364
2-CC-1365
2-CE-75

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AND NEW YORK SHIPPING ASSOCIATION, INC.,

and

DOLPHIN FORWARDING, INC.

and

SAN JUAN FREIGHT FORWARDERS, INC.

ORDER

On March 10, 1976, the General Counsel issued the consolidated complaint in the above-captioned case alleging that International Longshoremen's Association (herein referred to as Respondent ILA), and New York Shipping Association, Inc. (hereinafter referred to as Respondent NYSA), had violated Section 8(e) of the Act and that Respondent ILA had violated Section 8(b)(4)(i) and (ii)(B) of the Act by maintaining and enforcing a collective-bargaining agreement containing certain rules on containers against Dolphin Forwarding, Inc. (hereinafter referred to as Dolphin), the Charging Party in Cases Nos. 2-CC-1364 and 2-CE-75 and against San Juan Freight Forwarders, Inc. (hereinafter referred to as San Juan), the Charging Party in Case No. 2-CC-1365. Thereafter, Respondent ILA and Respondent NYSA timely filed answers and amended

answers. The amended answers contained certain affirmative defenses and General Counsel has moved to strike such affirmative answers.[1]

A. The Affirmative defenses of Respondent NYSA

Respondent's first defense is that the dispute underlying this proceeding is a primary dispute between it and its members on the one hand and Respondent ILA on the other. Its second defense is that the contract provisions here complained of are valid work preservation rules.

In *International Longshoremen's Association, AFL-CIO (Consolidated Express, Inc.)*, 221 NLRB 956 (1975), hereinafter referred to as the *Conex* case, the Board rejected similar defenses. Respondent NYSA asserts, however, that the instant case presents different factual issues which require a hearing of evidence on these affirmative defenses. As General Counsel notes, the assertion is contrary to the deposition of counsel in a Notice of Motion to stay proceedings in *Sidney Danielson* v. *International Longshoremen's Association and New York Shipping Association, Inc.*, U.S. D.C., Southern District of New York, Civil Action No. 75-Civ-4027, wherein the Regional Director of the Board, pursuant to the charges in this case, petitioned for an injunction pursuant to Section 10(1) of the Act. In that deposition, counsel averred that "the issues in the instant action are identical to the issues raised and fully litigated in [*Conex*]. The parties to this proceeding, except for the charging parties, are identical to those in [*Conex*]."

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[1] All parties have filed briefs in support of their positions. Respondent ILA has requested deferral of ruling on General Counsel's motion until the hearing or pending submission of further argument. The request is denied. The briefs previously filed adequately cover the issues and have been duly considered.

In *Conex,* the Board found that the Rules on containers were not valid work preservation rules and implicitly rejected the defense that the underlying dispute was a primary one between Respondent NYSA and Respondent ILA. In doing so, the Board defined the work in controversy as the LCL and LTC container work performed by the consolidators in that case at their own off-pier premises. As such work had traditionally been performed by consolidators at their own off-pier premises, the Board rejected the work preservation defense. Its holding was affirmed in *Longshoremen* v. *N.L.R.B.,* 537 F.2d 706 (2nd Cir., 1976).

General Counsel asserts in support of his motion that the consolidators in this case, Dolphin and San Juan, have traditionally performed the work here in question at off-pier premises, and Exhibits 3 and 4 submitted by Respondent NYSA in its reply to the motion to strike defenses support the assertion. Significantly, Respondent NYSA has not averred in its defenses of work preservation that Respondent ILA has historically and traditionally performed the LCL and LTC work performed by Dolphin and San Juan. Thus, it appears that Respondent NYSA by its first and second defenses is seeking to relitigate the same issue which the Board decided in *Conex.* That such is the case is evident from Respondent NYSA's assertion that a Supreme Court decision in *Northeast Marine Terminal Company* v. *Caputo,* Docket 76-444 (June 17, 1977) places in doubt the continuing validity of *Conex.* However, in *International Longshoremen's Association, AFL-CIO, et al. (Associated Transport, Inc., et al.),* 231 No. 64, a majority of the Board rejected a reading of *Caputo* which would, in effect, reverse *Conex.* To the contrary, the majority adverted to its words in *Conex* that "it is clear that the on-pier stripping and stuffing work performed by longshoremen as

an incident of loading and unloading ships does not embrace the work [of stuffing and stripping containers] traditionally performed by Consolidated and Twin at their own off-pier premises." Thus, it is clear that *Conex* is viable precedent for this case and that while "the facts of each case in the area are paramount,"[2] the facts that require consideration relate to the work traditionally performed by the consolidators off the pier. As noted earlier, Respondent NYSA has not averred that Respondent ILA has traditionally performed the work which Dolphin and San Juan was performing which became the subject matter of the controversy in the instant case.

For the foregoing reasons, I find merit to General Counsel's motion to strike the first and second defenses and they are hereby stricken.

2. Third defense

The third defense asserted by Respondent NYSA in its amended answer is that the charge against it is time barred under Section 10(b) of the Act.

The charge against Respondent NYSA was filed by Dolphin on May 6, 1975. While the Rules on Containers here alleged to be violative of Section 8(e) of the Act were entered into more than 6 months before the filing of Dolphin's charge, the complaint alleges, and the answer admits, that on January 23, 1975, Respondent NYSA, in implementation of the Rules on Containers, by admitted agents, levied fines upon Maritime Transportation Management Inc., of Puerto Rico and Transamerican Trailer Transport, Inc., by reason of their having furnished containers to Dolphin and San Juan. Such conduct would

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[2] *International Longshoremen's Association, AFL-CIO, et al. (Associated Transport, Inc., et al.), supra,* slip opinion, page 8.

constitute an entering into a contract within the meaning of Section 8(e) of the Act. As it occurred less than 6 months before the filing of the charge in 2-CE-75, the affirmative defense of Section 10(b) of the Act is without merit and is hereby stricken.[3]

3. Fourth Defense

Respondent NYSA's fourth defense is the allegation that Dolphin and San Juan have not obtained permits assertedly required by provisions of the Interstate Commerce Act to engage in the consolidation of freight of LTL and LCL cargo and have therefore not lawfully acquired the work which is the subject of dispute herein. This defense is stricken as legally insufficient. Dolphin's and San Juan's qualifications to perform the work in question under the provisions of the Interstate Commerce Act is a matter extraneous to the application and enforcement of the Act. The Board, in a proceeding of this type, must determine only whether Dolphin and San Juan are either employers or persons within the meaning of Sections 2(1) and (2) and 8(e) of the Act.

3. The affirmative defenses of Respondent ILA

1. First, Second, Third, and Sixth defenses

These defenses of Respondent ILA are essentially the same as the first, second, third and fourth defenses of Respondent NYSA and they are hereby stricken for the reasons given above with respect to Respondent NYSA's first, second, third, and fourth defenses.

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[3] Respondent NYSA has also moved to dismiss the complaint on the grounds that it is barred by Section 10(b) of the Act and it is moot. The motion to dismiss is denied.

2. Fourth defense

The fourth defense asserts laches on the part of Dolphin and San Juan in filing charges. The defense is legally insufficient and is hereby stricken.

3. Fifth defense

This defense avers that impairment of the Rules on Containers and reaffirmation of the holding in *Conex* will adversely effect 25,000 longshoremen and pensioners and their families and create chaos in the industry. This defense raises matters of policy not properly addressed to the Board and is legally insufficient.

It is hereby stricken.

HENRY L. JALETTE
Henry L. Jalette
Administrative Law Judge

Dated: September 12, 1977

Appendix F—Administrative Law Judge's Order Rejecting Evidence and Closing Hearing in *Dolphin.*

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Cases Nos. 2-CC-1364
2-CC-1365
2-CE-75

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION AND NEW YORK SHIPPING ASSOCIATION, INC.

and

DOLPHIN FORWARDING, INC.

and

SAN JUAN FREIGHT FORWARDERS, INC.

ORDER

Pursuant to agreement of the parties at hearing herein, Respondents New York Shipping Association and International Longshoremen's Association have submitted affidavits setting forth the evidence they wished to adduce in defense of the allegations of the complaint herein. Such affidavits and attached exhibits have been duly considered and they are hereby rejected as the matters contained therein relate to defenses which are deemed to be legally insufficient in light of the decision of the National Labor Relations Board in *International Longshoremen's Association, AFL-CIO (Consolidated Express, Inc., and Twin Express, Inc.),* 221 NLRB 956. The affidavits and exhibits attached thereto shall be placed in the rejected exhibit file.

Appendix F—Administrative Law Judge's Order Rejecting Evidence and Closing Hearing in Dolphin.

As Respondent's affidavits and exhibits have been rejected, in accordance with the agreement of the parties, the hearing scheduled for November 7, 1977, is hereby cancelled and the hearing is closed. The parties are given until

December 5, 1977, to file briefs.

HENRY L. JALETTE
Henry L. Jalette
Administrative Law Judge

Dated: November 2, 1977

Appendix G—Relevant Statutes.

Section 8(b)(4) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 158(b)(4):

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

Appendix G—Relevant Statutes.

Section 8(e) of the Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 158(e):

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purposes of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Appendix H—Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; McGowan, Tamm, Leventhal,* Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by respondent Board having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

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* Circuit Judge Leventhal considered this matter but died before the order issued.

Appendix H—Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

ORDERED, by the Court, *en banc,* that respondent's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judges Tamm, MacKinnon, Robb, and Wilkey would grant respondent's suggestion for rehearing *en banc.*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

Appendix H—Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; McGowan, Tamm, Leventhal,* Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by intervenor Houff Transfer, Inc., having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc,* that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judges Tamm, MacKinnon, Robb, and Wilkey would grant intervenor's suggestion for rehearing *en banc.*

---

* Circuit Judge Leventhal considered this matter but died before the order issued.

Appendix H—Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by intervenor Tidewater Motor Truck Association having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

Appendix H—Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

ORDERED, by the Court, *en banc,* that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judges Tamm, MacKinnon, and Robb would grant intervenor's suggestion for rehearing *en banc.*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1510 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and New York Shipping Association, Inc.,

Petitioners

v.

National Labor Relations Board,

Respondent

Dolphin Forwarding, Inc.,
Tidewater Motor Truck Association,

Intervenors

Appendix H—Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

ORDER

The suggestion for rehearing *en banc* filed by intervenor Dolphin Forwarding, Inc., having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, *en banc,* that intervenor's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Circuit Judges Tamm, MacKinnon, and Robb would grant intervenor's suggestion for rehearing *en banc.*

Appendix H—Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; Robinson and Robb, Circuit Judges

ORDER

Upon consideration of respondent's (Board) petition for rehearing, it is

ORDERED, by the Court, that respondent's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Appendix H—Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; Robinson and Robb, Circuit Judges

ORDER

Upon consideration of intervenor's (Houff Transfer, Inc.) petition for rehearing, it is

ORDERED, by the Court, that intervenor's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Appendix H—Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77-1735 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and Council of North Atlantic Shipping Association,

Petitioner

v.

National Labor Relations Board,

Respondent

And Consolidated Case No. 77-1758

BEFORE: Wright, Chief Judge; Robinson and Robb, Circuit Judges

ORDER

Upon consideration of intervenor's (Tidewater Motor Truck Assoc.) petition for rehearing, it is

ORDERED, by the Court, that intervenor's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Appendix H—Orders of Court of Appeals Denying Rehearing and Suggestion For Rehearing *En Banc*

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1510 September Term, 1979

FILED DEC 13 1979
GEORGE A. FISHER
Clerk

International Longshoremen's Association, AFL-CIO and New York Shipping Association, Inc.,
Petitioners

v.

National Labor Relations Board,
Respondent

Dolphin Forwarding, Inc.,

Tidewater Motor Truck Association,
Intervenors

BEFORE: Wright, Chief Judge; Robinson and Robb, Circuit Judges

ORDER

Upon consideration of intervenor's (Dolphin Forwarding, Inc.) petition for rehearing, it is

ORDERED, by the Court, that intervenor's aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:
/s/ GEORGE A. FISHER
George A. Fisher
Clerk

Supreme Court, U. S.
FILED
JAN 12 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1035 and 79-1036

In the Supreme Court of the United States

OCTOBER TERM, 1979

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1035

NEW YORK SHIPPING ASSOCIATION, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 79-1036

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

These petitions—filed by the union and the employer associations who prevailed in the court below—seek review of the same judgment which is sought to be reviewed by the petition for certiorari filed by the National Labor Relations Board. *NLRB* v. *International Longshoremen's Association, AFL-CIO and Council of*

North Atlantic Shipping Associations, et al., No. 79-1082, filed January 10, 1980. These petitions also present the same basic question as is presented by the Board's petition—*i.e.*, whether the Board properly concluded that contractual provisions adopted by the union and the employer-organizations to deal with containerization in the shipping industry (the Rules on Containers) violated Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e), and that union action to enforce those provisions violated Section 8(b)(4)(B) of the Act, 29 U.S.C. 158(b)(4)(B). Since this Court has rarely granted a petition for certiorari filed by the prevailing party,* and since the issues raised by the subject petitions can all be considered by this Court if it grants the Board's petition, no useful purpose would be served by granting the subject petitions. Accordingly, the petitions in Nos. 79-1035 and 79-1036 should be denied and the petition in No. 79-1082 should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

WILLIAM A. LUBBERS
General Counsel
National Labor Relations Board

JANUARY 1980

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*See R. Stern and E. Gressman, *Supreme Court Practice* 58-60 (5th ed. 1978).

DOJ-1980-01

Supreme Court, U. S.
FILED
JAN 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1035

NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HOUFF TRANSFER, INC., TIDEWATER MOTOR TRUCK ASSOCIATION and DOLPHIN FORWARDING, INC.,
Intervenor-Respondents

No. 79-1036

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HOUFF TRANSFER, INC., DOLPHIN FORWARDING, INC., and TIDEWATER MOTOR TRUCK ASSOCIATION,
Intervenor-Respondents.

No. 79-

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, et al.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

THOMAS W. GLEASON
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1035

NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HOUFF TRANSFER, INC., TIDEWATER MOTOR TRUCK ASSOCIATION and DOLPHIN FORWARDING, INC.,
Intervenor-Respondents.

No. 79-1036

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

HOUFF TRANSFER, INC., DOLPHIN FORWARDING, INC., and TIDEWATER MOTOR TRUCK ASSOCIATION,
Intervenor-Respondents.

No. 79-

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, et al.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

International Longshoremen's Association, AFL-CIO ("ILA"), petitioner in No. 79-1036 above and respondent in No. 79- above, submits this brief, pursuant to Rule 24 of the Rules of this Court, in support of the petition for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit filed by the Solicitor General of the United States on behalf of the National Labor Relations Board in No. 79- above.

Prior to the Solicitor General's filing on behalf of the Board, the ILA, on January 2, 1980, had filed its own petition (No. 79-1036) seeking review of the same decision of the District of Columbia Circuit. New York Shipping Association, Inc. ("NYSA") and Council of North Atlantic Shipping Associations ("CONASA") had also filed a petition (No. 79-1035) on December 31, 1979, seeking a similar writ of certiorari in the same matter.

Although the ILA does not agree with the factual and legal assertions in the Solicitor General's petition that go to the merits of the case, it concurs that the petition should be granted for the reasons set forth in its own petition and that of NYSA and CONASA.

Petitioners on all the pending petitions agree that review by this Court is necessary to resolve a manifest conflict between circuits which involves the interpretation and effect of both a labor statute of national application and earlier decisions by this Court. This conflict, which has widespread collateral ramifications, subjects different jurisdictions, and sometimes the selfsame ports, to diametrically opposed rulings in frustration of the expressed will of Congress that national labor law be uniformly applied. Until this Court renders a decision, the law is so unsettled in the longshore industry in the eastern half of the United States as to virtually preclude meaningful collective bargaining in forthcoming negotiations necessary to avert the widespread labor unrest which has marked the industry in the past, all to the detriment of the national economy.

CONCLUSION

For the foregoing reasons the petitions for writs of certiorari should be granted.

Dated: New York, New York
January 8, 1980

Respectfully submitted,

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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1035

NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,
Petitioners,

v.

NATION LABOR RELATIONS BOARD,
Respondent,

and

HOUFF TRANSFER, INC., TIDEWATER MOTOR TRUCK ASSOCIATION and DOLPHIN FORWARDING, INC.,
Intervenor-Respondents.

No. 79-1036

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents,

No. 79-1082

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,
Respondents.

No. 79-

TIDEWATER MOTOR TRUCK ASSOCIATION,
Petitioner,

and

NATIONAL LABOR RELATIONS BOARD, et al.,
Respondents,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,
Respondents.

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No. 79-

HOUFF TRANSFER, INC.,
Cross-Petitioner,

and

NATIONAL LABOR RELATIONS BOARD, et al.,
Petitioner in No. 79-1082,

v.

NEW YORK SHIPPING ASSOCIATION, et al.,
Petitioner in Nos. 79-1035, 79-1036.

No. 79-

DOLPHIN FORWARDING, INC., et al.,
Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

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No. 79-

HOUFF TRANSFER, INC.,
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and
NATIONAL LABOR RELATIONS BOARD, et al.,
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Petitioner in Nos. 79-1035, 79-1036.

No. 79-

DOLPHIN FORWARDING, INC., et al.,
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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Ths brief is filed by the International Longshoremen's Association, AFL-CIO ("ILA"), petitioner in No. 79-1036 above, pursuant to Rule 24 of the Rules of this Court, in response to petitions filed by Tidewater Motor Truck Association (No. 79-), Houff Transfer, Inc. (No. 79-), and Dolphin Forwarding, Inc. (No. 79-) for Writs of Certiorari to review the judgment entered in this case on September 25, 1979 by the United States Court of Appeals for the District of Columbia Circuit.

These three petitioners are already respondents on petitions filed by ILA (No. 79-1036) on January 2, 1980 and by New York Shipping Association, Inc. ("NYSA") and Council of North Atlantic Shipping Associations ("CONASA") (No. 79-1035) on December 31, 1979. The Solicitor General has also filed a petition on behalf of the National Labor Relations Board (No. 79-1082) seeking review of the same judgment.

Without admitting or endorsing the legal or factual arguments on the merits contained in the latest petitions, the ILA agrees that this Court should review the decision of the District of Columbia Circuit for the reasons set forth in the petitions of the ILA and of NYSA and CONASA heretofore filed.

CONCLUSION

For the foregoing reasons the petitions for Writs of Certiorari should be granted.

Dated: New York, New York
January 16, 1980

Respectfully submitted,

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